TAB 10

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R. v. Stone

Bert Thomas Stone, Appellant v. Her Majesty The Queen, Respondent

Her Majesty The Queen, Appellant v. Bert Thomas Stone, Respondent and The Attorney General of Canada, the Attorney General for Ontario and the Attorney General for Alberta, Interveners

Supreme Court of Canada

Lamer C.J.C., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Heard: June 26, 1998
Judgment: May 27, 1999
Docket: 25969, 26032

Proceedings: affirming (1997), 6 C.R. (5th) 367, 113 C.C.C. (3d) 158, 86 B.C.A.C. 169, 142 W.A.C. 169, B.C.J. No. 179 (QL) (B.C. C.A.); affirming (1997), 89 B.C.A.C. 139, 145 W.A.C. 139, B.C.J. No. 694 (QL) (B.C. C.A.)

Counsel: *David G. Butcher* and *Derek A. Brindle*, for Bert Thomas Stone.

Gil D. McKinnon, Q.C., *Ujjal Dosanjh, Q.C.* and *Marion Paruk*, for Her Majesty the Queen.

Graham Garton, Q.C., for Intervener the Attorney General of Canada.

Gary T. Trotter, for Intervener the Attorney General for Ontario.

Jack Watson, Q.C., written submissions only, for Intervener the Attorney General for Alberta.

Subject: Criminal; Evidence

Criminal law --- Defences — Automatism — What constitutes — Dissociative state

Accused convicted of manslaughter claimed he acted in dissociative state caused by psychological blow — Trial judge withheld defence of non-insane automatism from jury — Accused appealed dismissal of appeal from conviction — Appeal dismissed — Defence of automatism imposes evidentiary burden on accused to rebut presumption of voluntariness — "Psychological blow" automatism requires evidence of "extremely shocking" trig-

ger — Trial judge applied wrong test but reached correct result — Trigger was not extreme shock that would cause normal person to dissociate — Accused suffered from "disease of the mind" — Only mental disorder automatism could be put to jury — Criminal Code, R.S.C. 1985, c. C-46, s. 16 — Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d).

Criminal law --- Defences — Mental disorder — Requirements — Disease of the mind — General

Accused convicted of manslaughter claimed he acted in dissociative state caused by psychological blow — Trial judge withheld defence of non-insane automatism from jury — Accused appealed dismissal of appeal from conviction — Appeal dismissed — Where proper foundation for defence of automatism is established, trial judge must determine whether condition is mental disorder or non-mental disorder automatism — "Disease of the mind" inquiry requires holistic approach — Trial judge applied wrong test but reached correct result — Accused suffered from "disease of the mind" — Only mental disorder automatism could be put to jury — Criminal Code, R.S.C. 1985, c. C-46, ss. 2, 16 — Canadian Charter of Rights and Freedoms, ss. 7, 11(d).

Criminal law --- Pre-trial practice — Disclosure of evidence — Disclosure — Compelling production

Accused convicted of manslaughter claimed he acted in dissociative state caused by psychological blow — Trial judge ordered production of defence expert report to Crown at end of its opening statement — Accused appealed dismissal of appeal from conviction — Appeal dismissed — Defence waived privilege attached to expert report by disclosing portions in opening statement — Report would have been disclosed in any event after calling expert as witness — Trial judge acted appropriately — Compelled premature disclosure did not violate accused's Charter rights or result in miscarriage of justice — Canadian Charter of Rights and Freedoms, s. 7.

Criminal law --- Defences — Provocation — What constitutes — Wrongful act or insult

Accused was convicted of manslaughter and sentenced to seven years' imprisonment — Accused claimed he acted in dissociative state caused by wife's verbal abuse — Crown appealed dismissal of appeal from sentence on ground that trial judge erred in considering provocation as mitigating factor when it had reduced murder to manslaughter — Appeal dismissed — Sentence must reflect moral culpability of offender — Provocation may be considered in assessing moral culpability of accused and determining appropriate sentence — No error by trial judge — Criminal Code, R.S.C. 1985, c. C-46, s. 232.

Criminal law --- Appeals — Appeal of sentence — Grounds — Error in principle

Accused was convicted of manslaughter and sentenced to seven years' imprisonment — Accused claimed he acted in dissociative state caused by wife's verbal abuse — Crown appealed dismissal of appeal from sentence on ground that sentencing judge erred in considering provocation as mitigating factor when it had reduced murder to manslaughter — Appeal dismissed — Sentence must reflect moral culpability of offender — Provocation may be considered in assessing moral culpability of accused and determining appropriate sentence — No error by trial judge — Criminal Code, R.S.C. 1985, c. C-46, s. 232.

Criminal law --- Appeals — Appeal of sentence — Grounds — Failure to consider substantial elements

Accused was convicted of manslaughter and sentenced to seven years' imprisonment — Accused claimed he acted in dissociative state caused by wife's verbal abuse — Crown appealed dismissal of appeal from sentence on ground that it failed to reflect gravity of offence and moral culpability of offender — Appeal dismissed —

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Spousal killings are serious aggravating factor in sentencing — Sentencing judge properly identified offence as one of domestic violence and was aware of aggravating and mitigating factors — Sentence not demonstrably unfit — Criminal Code, R.S.C. 1985, c. C-46, s. 718.2(a)(ii).

Criminal law --- Offences against the person and reputation — Manslaughter — Sentencing — Adult offenders — Quantum

Accused was convicted of manslaughter and sentenced to seven years' imprisonment — Accused claimed he acted in dissociative state caused by wife's verbal abuse — Crown appealed dismissal of appeal from sentence on ground that it was demonstrably unfit — Appeal dismissed — Appellate courts may fix ranges for particular categories of offences — "Double counting" of provocation not responsible for low sentencing range for provoked spousal manslaughter — Crown failed to demonstrate sentencing judge's assessment of facts and relevant authorities was clearly unreasonable — Sentence not inadequate.

Evidence --- Legal proof — Burden of proof — General principles

Accused convicted of manslaughter claimed he acted in dissociative state caused by psychological blow — Trial judge withheld defence of non-insane automatism from jury — Accused appealed dismissal of appeal from conviction — Appeal dismissed — Defence of automatism imposes evidentiary burden on accused to rebut presumption of voluntariness — Placing burden on defence violates s. 11(d) of Charter but can be justified under s. 1 — Objective element to "disease of the mind" test does not affect burden of proof with respect to voluntariness or violate Charter — Criminal Code, R.S.C. 1985, c. C-46, s. 16 — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, ss. 1, 7, 11(d).

Criminal law --- Offences against the person and reputation — Manslaughter — General offence — Nature and elements of offence

Accused convicted of manslaughter claimed he acted in dissociative state caused by psychological blow — Trial judge withheld defence of non-insane automatism from jury — Accused appealed dismissal of appeal from conviction — Appeal dismissed — Voluntariness is part of actus reus of criminal responsibility — Defence of automatism imposes evidentiary burden on accused to rebut presumption of voluntariness — Trial judge applied wrong test but reached correct result — Accused suffered from "disease of the mind" — Only mental disorder automatism could be put to jury — Criminal Code, R.S.C. 1985, c. C-46, s. 16 — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, ss. 1, 7, 11(d).

Droit criminel --- Moyens de défense — Automatisme — Ce qui constitue — État dissociatif

Accusé déclaré coupable d'homicide involontaire coupable a prétendu avoir agi en état de dissociation causé par un choc psychologique — Juge du procès a soustrait la défense d'automatisme sans aliénation mentale des éléments soumis au jury — Accusé a formé un pourvoi à l'encontre du rejet de son appel de la déclaration de culpabilité — Pourvoi rejeté — Défense d'automatisme impose à l'accusé de réfuter la présomption d'acte volontaire — Automatisme lié à un « choc psychologique » exige la preuve d'un élément déclencheur « extrêmement traumatisant » — Juge du procès a appliqué le mauvais critère mais il a atteint le bon résultat — Élément déclencheur n'était pas un choc extrême susceptible de causer un état dissociatif chez une personne normale — Accusé a souffert d'une « maladie mentale » — Seul l'automatisme avec aliénation mentale pouvait être

soumis au jury — Code criminel, L.R.C. 1985, c. C-46, art. 16 — Charte canadienne des droits et libertés, art. 1, 7, 11 d).

Droit criminel --- Moyens de défense — Troubles mentaux — Exigences — Maladie mentale — En général

Accusé déclaré coupable d'homicide involontaire coupable a prétendu avoir agi en état de dissociation causé par un choc psychologique — Juge du procès a soustrait la défense d'automatisme sans aliénation mentale des éléments soumis au jury — Accusé a formé un pourvoi à l'encontre du rejet de son appel de la déclaration de culpabilité — Pourvoi rejeté — Lorsqu'il existe un fondement à la défense d'automatisme, le juge du procès doit déterminer s'il s'agit d'un automatisme avec aliénation mentale ou sans aliénation mentale — Examen d'une « maladie mentale » exige une démarche holistique — Accusé a souffert d'une « maladie mentale » — Seul l'automatisme avec aliénation mentale pouvait être soumis au jury — Code criminel, L.R.C. 1985, c. C-46, art. 2, 16 — Charte canadienne des droits et libertés, art. 7, 11 d).

Droit criminel --- Procédure préliminaire — Communication de la preuve — Communication — Production obligatoire

Accusé déclaré coupable d'homicide involontaire coupable a prétendu avoir agi en état de dissociation causé par un choc psychologique — Juge du procès a ordonné la communication au ministère public du rapport d'expertise de la défense à la suite de l'exposé préliminaire — Accusé a formé un pourvoi à l'encontre du rejet de son appel de la déclaration de culpabilité — Pourvoi rejeté — Défense a renoncé au privilège rattaché au rapport d'expertise en en divulguant des éléments lors de l'ouverture de sa preuve — Rapport aurait, de toute façon, été divulgué au moment du témoignage de l'expert — Juge du procès a agi correctement — Communication prématurée forçée n'a pas porté atteinte aux droits en vertu de la Charte de l'accusé et ne constitue pas une déconsidération de la justice — Charte canadienne des droits et libertés, art. 7.

Droit criminel --- Moyens de défense — Provocation — Ce qui constitue — Acte illégitime ou insulte

Accusé a été reconnu coupable d'homicide involontaire coupable et condamné à sept ans d'emprisonnement — Accusé a soutenu avoir agi alors qu'il se trouvait dans un état de dissociation causé par la violence verbale de son épouse — Pourvoi du ministère public à l'encontre du rejet de l'appel de la sentence au motif que le juge du procès a erré en considérant la provocation comme un facteur atténuant au moment de réduire l'accusation de meurtre à celle d'homicide involontaire coupable — Pourvoi rejeté — Sentence doit refléter la culpabilité morale du contrevenant — Provocation peut être considérére au moment de déterminer la culpabilité morale de l'accusé et la peine appropriée — Aucune erreur de la part du juge du procès — Code criminel, L.R.C. 1985, ch. C-46, art. 232.

Droit criminel --- Pourvois — Pourvois à l'encontre de la peine — Motifs — Erreur sur le principe

Accusé a été reconnu coupable d'homicide involontaire coupable et condamné à sept ans d'emprisonnement — Accusé a soutenu avoir agi alors qu'il se trouvait dans un état de dissociation causé par la violence verbale de son épouse — Pourvoi du ministère public à l'encontre du rejet de l'appel de la sentence au motif que le juge du procès a erré en considérant la provocation comme un facteur atténuant au moment de réduire l'accusation de meurtre à celle d'homicide involontaire coupable — Pourvoi rejeté — Sentence doit refléter la culpabilité morale du contrevenant — Provocation peut être considérée au moment de déterminer la culpabilité morale de l'accusé et la peine appropriée — Aucune erreur de la part du juge du procès — Code criminel, L.R.C. 1985, ch. C-46, art. 232.

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Droit criminel --- Pourvois — Pourvois à l'encontre de la peine — Motifs — Omission de considérer des éléments importants

Accusé a été reconnu coupable d'homicide involontaire coupable et condamné à sept ans d'emprisonnement — Accusé a soutenu avoir agi alors qu'il se trouvait dans un état de dissociation causé par la violence verbale de son épouse — Pourvoi du ministère public à l'encontre du rejet de l'appel de la sentence au motif qu'elle ne reflétait pas la gravité de l'infraction ni la culpabilité morale de l'accusé — Pourvoi rejeté — Lien conjugal entre la victime et le meurtrier constitue un facteur aggravant en matière de détermination de la peine — Juge de la détermination de la peine a correctement identifié l'infraction comme une de violence conjugale et il était conscient des facteurs atténuants et aggravants — Sentence n'était pas nettement déraisonnable — Code criminel, L.R.C. 1985, ch. C-46, art. 718.2 a) (iii).

Droit criminel --- Infractions contre la personne et atteinte à la réputation — Homicide involontaire coupable — Détermination de la peine — Contrevenants adultes — Quantum

Accusé a été reconnu coupable d'homicide involontaire coupable et condamné à sept ans d'emprisonnement — Accusé a soutenu avoir agi alors qu'il se trouvait dans un état de dissociation causé par la violence verbale de son épouse — Pourvoi du ministère public à l'encontre du rejet de l'appel de la sentence au motif qu'elle n'était pas indiquée — Pourvoi rejeté — Tribunaux d'appel peuvent fixer des échelles relatives à des catégories particulières d'infractions — « Double avantage » de la provocation n'est pas responsable d'une échelle de peines moins sévères pour un homicide involontaire coupable de l'époux à la suite d'une provocation — Ministère public n'a pas démontré que l'évaluation des faits et des autorités par le juge était nettement déraisonnable — Peine n'était pas non indiquée.

Preuve --- Preuve légale — Fardeau de preuve — Principes généraux

Accusé déclaré coupable d'homicide involontaire coupable a prétendu avoir agi en état de dissociation causé par un choc psychologique — Juge du procès a soustrait la défense d'automatisme sans aliénation mentale des éléments soumis au jury — Accusé a formé un pourvoi à l'encontre du rejet de son appel de la condamnation — Pourvoi rejeté — Défense d'automatisme impose à l'accusé de réfuter la présomption d'acte volontaire — Imposer le fardeau de preuve à la défense viole l'art. 11 d) de la Charte mais se justifie en vertu de l'art. 1 — Élément objectif du critère relatif aux « troubles mentaux » n'affecte pas le fardeau de preuve relativement à l'aspect volontaire ni ne porte atteinte à la Charte — Code criminel, L.R.C. 1985, ch. C-46, art. 16 — Charte canadienne des droits et libertés, art. 1, 7, 11 d).

Droit criminel --- Infractions contre la personne et atteinte à la réputation — Homicide involontaire coupable — Infraction générale — Nature et éléments de l'infraction

Accusé déclaré coupable d'homicide involontaire coupable a prétendu avoir agi en état de dissociation causé par un choc psychologique — Juge du procès a soustrait la défense d'automatisme sans aliénation mentale des éléments soumis au jury — Accusé a formé un pourvoi à l'encontre du rejet de son appel de la condamnation — Pourvoi rejeté — Élément volontaire fait partie de l'actus reus de la responsabilité criminelle — Automatisme comme moyen de défense impose à l'accusé le fardeau de réfuter la présomption d'acte volontaire — Juge du procès a appliqué le mauvais critère mais il a atteint le bon résultat — Accusé a souffert d'une « maladie mentale » — Seul l'automatisme avec aliénation mentale pouvait être soumis au jury — Code criminel, L.R.C. 1985, c. C-46, art. 16 — Charte canadienne des droits et libertés, art. 1, 7, 11 d).

The accused killed his wife in a frenzy, stabbing her 47 times. He acknowledged killing her, but claimed that he lost consciousness when his mind snapped under the weight of her aggressive verbal abuse. The accused testified that a "whooshing" sensation washed over him. When his eyes focussed again, he was holding a knife and his wife was slumped over on the seat beside him. He had no recollection of stabbing her. He disposed of her body and fled to Mexico. While there, he awoke to the sensation of having his throat cut, and remembered stabbing his wife before experiencing the "whooshing" sensation. The accused returned to Canada and was charged with second degree murder. In his defence, he pleaded insane and non-insane automatism and provocation. In opening remarks, defence counsel told the jury that the automatism defence would be supported by expert psychiatric evidence. The defence was ordered to produce a copy of the expert's report to the Crown at the end of its opening statement.

The trial judge found evidence that the accused was unconscious "throughout the commission of the crime" and held that the defence had successfully laid a foundation for a plea of insane automatism. However, he ruled that the cause of the automatism was internal to the accused, and withheld the defence of non-insane automatism from the jury. The accused was convicted of manslaughter and sentenced to seven years' imprisonment. Both the conviction and sentence were upheld on appeal.

The accused appealed the conviction, claiming that the trial judge erred in failing to put the defence of non-insane automatism to the jury, and that taking the issue of voluntariness away from the jury violated his rights under ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. The accused also claimed that compelled disclosure of the expert's report violated his s. 7 right to remain silent. The Crown appealed the sentence on the grounds that the trial judge erred in principle by considering provocation as a mitigating factor in sentencing when it had already reduced the stigma and penalty of murder to manslaughter, and that the sentence was demonstrably unfit in that it failed to reflect the gravity of the offence and moral culpability of the offender.

Held: The appeals were dismissed.

Per Bastarache J. (Cory, Gonthier, L'Heureux-Dubé and McLachlin JJ. concurring): Automatism is a state of impaired consciousness in which an individual, though capable of action, has no voluntary control over that action. Two forms of automatism are recognized at law. Involuntary action which does not stem from a disease of the mind gives rise to a claim of non-insane automatism which, if successful, entitles the accused to an absolute acquittal. Involuntary action which results from a disease of the mind gives rise to a claim of insane automatism and, pursuant to s. 16 of the *Criminal Code*, results in a verdict of not criminally responsible by reason of mental disorder.

A general test applicable to all cases involving claims of automatism is required. In determining whether automatism should be left with the trier of fact, the trial judge must first assess whether a proper foundation for the defence has been established. The law presumes that people act voluntarily. Since a defence of automatism amounts to a denial of voluntariness, which is part of the actus reus of criminal responsibility, establishing a proper foundation imposes an evidentiary burden on the accused to rebut the presumption of voluntariness. This evidentiary burden is directly related to the nature of the legal burden on the defence. It will be met only where the the trial judge is satisfied that there is evidence on which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. In all cases, the defence must assert involuntariness and present confirming psychiatric evidence. In addition, a medical history of automatistic-like dissociative states, corroborating evidence of bystanders, evidence of motive, evidence of the severity of the triggering stimulus, and whether the alleged trigger is the victim will also be relevant. No single factor is determinative. Although

placing a burden on the defence with respect to an element of the offence constitutes a limitation of the accused's rights under s. 11(d) of the *Charter*, it is necessary to further the objective behind the presumption of voluntariness andcan be justified under s. 1.

Once a proper foundation for the defence has been laid, the trial judge must determine whether mental disorder or non-mental disorder automatism should be left with the trier of fact. Mental disorder is a legal term, defined in the *Criminal Code* as a "disease of the mind." The trial judge should start from the proposition that the condition from which the accused claims to suffer is a disease of the mind, and then consider whether the evidence takes the condition out of that category. There are two distinct approaches to the "disease of the mind" inquiry. Under the "internal cause" theory, the accused's automatistic reaction to a "psychological blow" is compared to the way a normal person in the same circumstances would be expected to react. A claim of "psychological blow" automatism requires evidence of an "extremely shocking" trigger before non-mental disorder automatism may be left with the trier of fact. Involuntariness caused by mere stress is presumed to be triggered by a factor internal to the accused, and as such gives rise to a defence of mental disorder automatism only. The objective element to this comparison does not violate ss. 7 or 11(d) of the *Charter*, since it affects only the classification of the defence and does not alter the burden of proof with respect to voluntariness. Under the "continuing danger" theory, any condition which is likely to present a recurring danger to the public is treated as a disease of the mind. The most relevant factors to consider are the psychiatric history of the accused and the likelihood that the trigger which caused the automatism will recur. A more holistic approach, informed by both the "internal cause" and "continuing danger" theories and the relevant policy concerns, should be adopted.

If the condition from which the accused suffers is not a disease of the mind, only non-mental disorder automatism will be left with the trier of fact, who must then determine whether the defence has proven on a balance of probabilities that the accused acted involuntarily. If the condition is a disease of the mind, only mental disorder automatism will be left with the trier of fact. The defence must then prove on a balance of probabilities that the accused suffered from a mental disorder which rendered him or her incapable of appreciating the nature and quality of his or her act. The trier of fact's determination on this issue will absorb the question of voluntariness.

Lack of voluntariness is the key legal element of automatism. Therefore, in assessing whether a proper foundation for the defence was established, the trial judge should have considered whether there was evidence that the accused experienced a state of impaired consciousness in which he had no voluntary control over his actions, rather than evidence that he was unconscious throughout the commission of the crime. The trial judge's reasons failed to reveal what effect the "internal cause," "continuing danger," and other policy factors had on his decision to leave only mental disorder automatism with the jury. Nevertheless, he reached the correct result on the "disease of the mind" inquiry. The trigger was not an extreme shock or psychological blow that would cause a normal person to dissociate, and only mental disorder automatism could be put to the jury. No substantial wrong or miscarriage of justice occurred.

The reasons of Binnie J. with respect to disclosure of the defence psychiatrist's report were concurred with.

Appellate courts should not vary a sentence unless it is unfit or clearly unreasonable. The sentencing judge did not err in principle by considering provocation as a mitigating factor in sentencing. In reaching a sentence which accurately reflects the moral culpability of the offender, all the circumstances of the offence must be considered. To ignore a defence of provocation would be to ignore probative evidence of an offender's mental state at the time of the killing. In cases involving provocation, s. 232 of the *Criminal Code* permits a verdict of murder to be reduced to manslaughter, which in turn allows provocation to be considered in assessing the offender's moral

culpability and determining an appropriate sentence. An accused does not gain a "double benefit" in the process. Rather, s. 232 provides the accused with a single benefit of a reduced verdict to allow the provoked nature of the killing to be considered in determining an appropriate sentence. The Crown's argument that the provocation factor was spent because it had already reduced the legal character of the crime to manslaughter overlooked the purpose of s. 232 and must fail.

It is incumbent on the judiciary to bring the law into harmony with prevailing social values. Spousal killings involve the breach of a socially recognized and valued trust, and are recognized as a serious aggravating factor both under s. 718.2(a)(ii) of the *Criminal Code* and at common law. The sentencing judge was aware of the spousal relationship between the accused and the victim and heard the Crown's submissions on sentence. In his reasons, he specifically identified the offence as one of domestic violence, and noted that general deterrence was the primary concern in sentencing. The Crown failed to establish that the domestic nature of the offence was not properly considered

In minimizing disparity in sentencing in cases involving similar offences and similar offenders, appellate courts may fix ranges for particular categories of offences as guidelines for the lower courts, provided that the categories created and logic behind their respective starting points are clearly specified. However, the duty of sentencing judges to consider all relevant circumstances in sentencing must not be interfered with, and there is no precise range that will apply to every case. The Crown's argument that "double counting" of provocation was responsible for driving sentencing ranges for cases of provoked spousal manslaughter into the lower end of the sentencing spectrum for manslaughter failed to recognize that provocation is just one of many factors to be considered in assessing what end of the sentencing range was appropriate in the circumstances of a particular case. Personal characteristics of the offender and other surrounding circumstances are also relevant. The Crown failed to establish that the sentencing judge's assessment of the facts and relevant authorities was clearly unreasonable. He was aware of the aggravating and mitigating factors and considered all relevant principles. The appeal from sentence should be dismissed and the sentence affirmed.

Per Binnie J. (dissenting) (Lamer C.J.C., Iacobucci and Major JJ. concurring): The trial judge properly applied the test with respect to the evidential onus. The accused's evidence that he was unconscious "throughout the commission of the crime" was supported by the expert opinion of the defence psychiatrist. Voluntariness is part of the actus reus requirement of criminal liability and pre-supposes a measure of conscious control. From a legal perspective, "unconsciousness" means that the accused did not know what he was doing. Accordingly, a claim of automatism, or lack of consciousness, puts in issue the Crown's ability to prove all the elements of an offence beyond a reasonable doubt. It is a fundamental principle of criminal law that no act is a crime unless it is performed or omitted voluntarily. An inference of voluntariness cannot be drawn where, as here, the trial judge finds credible evidence that the accused was unconscious throughout the commission of the offence.

Automatism and provocation are distinct concepts, and their application depends on the impact of the triggering event on an accused. Automatism relates to lack of voluntariness, whereas provocation is a recognition that an accused who "voluntarily" committed all the elements of murder may have been provoked by a wrongful act or insult that would have deprived an ordinary person of the power of self-control. Provocation is not considered until the subjective elements of unlawful homicide have been successfully established beyond a reasonable doubt, and does not relieve the Crown of any element of its proof. It merely operates to reduce an established case of murder to manslaughter. Conduct insufficient to ground provocation should not be permitted to support a defence of non-insane automatism, which may lead to an outright acquittal.

Placing a persuasive or legal burden of proof on the accused to establish automatism on a balance of probabilities would represent a change in the settled law and infringe the presumption of innocence guaranteed by s. 11(d) of the *Charter*. The imposition of an evidential burden does not mean that an accused carries any part of the persuasive burden. Parliament chose to impose a persuasive burden on a balance of probabilities in the case of mental disorder automatism, but not in the case of non-mental disorder automatism. This Court should not take it upon itself to reverse the persuasive burden to the disadvantage of the accused. Such a reversal would create a potential for injustice and require justification under s. 1. The persuasive burden remains on the Crown to negate a state of mind asserted by an accused.

The real issue in the "disease of the mind" inquiry is whether the accused's mental faculties are so severely impaired as to render him incapable of appreciating the nature and quality of the act or omission, or of knowing that it was wrong. These consequences are clearly directed to issues other than voluntariness. The conceptual problems associated with the "internal cause" theory, on which the Crown relied in submitting that the accused's"dissociation" was a"disease of the mind"and subject to s. 16 of the *Criminal Code*, amply justified downgrading its status to an analytical tool. Furthermore, an isolated act of violent behaviour presents different public policy issues from conduct rooted in a disease of the mind. The risk of recurrence is therefore legitimately part of the public safety policy component of the"disease of the mind"analysis. Where, as here, the medical experts agreed there was no disease of the mind, and the only justification for attributing the accused's conduct to mental disorder was his inability to identify a specific "external cause" for his automatism, there was no justification for shifting the persuasive burden of proof from the Crown to the defence and for taking the issue of non-mental disorder automatism away from the jury. It was also wrong to have required the accused to substitute for his chosen defence of involuntariness the conceptually different plea of insanity. The statutory inquiry into whether the accused was suffering from a mental disorder that rendered him incapable of appreciating the nature and quality of his act, or of knowing that it was wrong, were qualitative questions unrelated to his allegation of unconsciousness.

The courts must respect the allocation by Parliament to the jury the tasks of assessing credibility and making findings of fact. Once the accused discharged his evidential onus, he was entitled to the jury's verdict on whether his conduct, though sane, was involuntary. Failure to put the issue of voluntariness to the jury deprived the accused of the benefit of an evidentiary ruling in his favour and violated ss. 11(d) and (f) of the *Charter*. The Crown having been relieved of the one real challenge to its proof, the accused was entitled to a new trial.

A report prepared by a defence expert is normally privileged and not properly subject to a disclosure order. The accused, through his counsel, waived that privilege at the opening of the defence case. Having disclosed those portions of the psychiatrist's report which were favourable to the accused, defence counsel could not then conceal the balance of the report which might contradict or qualify what had been disclosed. Alternatively, calling the defence expert would constitute waiver of any privilege attached to his report. A witness who takes the stand is no longer offering private advice to a party, but an opinion to assist the court, and the opposing party must have access to the foundation of that opinion to test it adequately. The trial judge acted appropriately in ordering the production of the full report at the conclusion of the defence's opening statement. Given that the report would have been disclosed in any event as soon as the defence expert took the witness stand, the premature compelled disclosure did not have any material impact on the outcome of the trial or occasion any miscarriage of justice.

Had the conclusion of Bastarache J. to dismiss the appeal against conviction been shared, the dismissal of the appeal against sentence would also have been concurred with for the reasons given.

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L'accusé a tué sa femme dans un moment de folie en la poignardant 47 fois. Il a reconnu l'avoir tuée, mais a prétendu avoir subi une perte de conscience provoquée par la violence verbale de celle-ci. Dans son témoignage, l'accusé a déclaré qu'il avait eu la sensation « d'être emporté » par une vague le submergeant en entier. Lorsqu'il a repris conscience, il tenait un couteau et a vu sa femme effondrée sur le siège à côté de lui. Il n'avait aucun souvenir de l'avoir poignardée. Il s'est débarrassé du corps de la victime et s'est enfui au Mexique. Une fois là-bas, il s'est réveillé en proie à la sensation qu'on lui tranchait la gorge et s'est souvenu avoir poignardé sa femme avant d'avoir éprouver la sensation « d'être emporté ». Il est revenu au Canada et a été inculpé de meurtre au deuxième degré. Dans sa défense, l'accusé a plaidé l'automatisme avec et sans aliénation mentale de même que la provocation. Dans ses remarques préliminaires, l'avocat de la défense a déclaré au jury que la défense d'automatisme serait soutenue par le témoignage de l'expert en psychiatrie. Suite à ces remarques, il a été ordonné à la défense de produire pour le ministère public une copie du rapport d'expert.

Le juge du procès a jugé que la preuve démontrait que l'accusé avait perdu conscience « tout au long de la perpétration du crime » et conclu que la défense avait réussi à établir les fondements d'une défense d'automatisme. Il a toutefois décidé que la cause de l'automatisme se trouvait dans la tête de l'accusé et s'est abstenu de soumettre la défense d'automatisme sans aliénation mentale au jury. L'accusé a été déclaré coupable d'homicide involontaire et condamné à une peine de sept ans d'emprisonnement. La déclaration de culpabilité de même que la sentence ont été maintenues en appel.

L'accusé a porté sa condamnation en appel, alléguant que le juge de première instance avait commis une erreur en ne soumettant pas la défense d'automatisme sans aliénation mentale au jury et que le fait d'avoir écarter la question du caractère volontaire de l'appréciation du jury avait violé ses droits en vertu des art. 7 et 11d) de la *Charte canadienne des droits et libertés*. Il prétendait également que la divulgation forcée du rapport de l'expert violait son droit de garder le silence reconnu par l'art. 7 de la Charte. Le ministère public a interjeté appel de la sentence au motif que le juge du procès avait commis une erreur de principe en considérant la provocation comme un facteur atténuant aux fins de la détermination de la sentence alors qu'elle avait déjà permis de réduire de meurtre à homicide involontaire coupable le stigmate et la sanction liés à un homicide volontaire, et que la sentence était manifestement inadéquate puisqu'elle ne reflétait pas la gravité de l'infraction et la culpabilité morale du contrevenant.

Arrêt: Les pourvois ont été rejetés.

Le juge Bastarache (les juges Cory, Gonthier, L'Heureux-Dubé et McLachlin y souscrivant) : L'automatisme est un état de conscience diminué dans lequel une personne, bien que capable de commettre un acte, n'a pas la maîtrise de cet acte. Le droit reconnaît deux formes d'automatisme. L'acte involontaire ne résultant pas d'une maladie mentale donne ouverture à une défense d'automatisme sans aliénation mentale qui, si elle est admise, donne à l'accusé le droit d'être acquitté. L'acte involontaire résultant d'une maladie mentale permet d'invoquer l'automatisme avec aliénation mentale. L'acte involontaire résultant d'une maladie mentale donne ouverture à une défense d'automatisme avec aliénation mentale et, suivant l'art. 16 du *Code criminel*, celle-ci entraîne un verdict de non-responsabilité criminelle pour cause de troubles mentaux.

Il convient d'adopter un critère général applicable à toutes les affaires où l'automatisme est invoqué. Pour trancher la question de savoir si la défense d'automatisme devrait être laissée à l'appréciation du juge des faits, le juge du procès doit tout d'abord déterminer si les fondements de la défense d'automatisme ont été établis. Le droit présume que les gens agissent volontairement. Étant donné que la défense d'automatisme revient à nier l'existence du caractère volontaire, lequel constitue une composante de l'élément d'*actus reus* de la responsabilité

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criminelle, l'établissement des fondements de l'automatisme oblige l'accusé à s'acquitter de la charge de présentation qui consiste à réfuter la présomption du caractère volontaire. Cette charge de présentation est directement liée à la nature de la charge de persuasion qui incombe à l'accusé. Celui-ci ne se sera acquitté de sa charge que lorsque le juge est convaincu qu'il existe une preuve permettant à un « jury ayant reçu des directives appropriées » de conclure, selon la prépondérance des probabilités, que l'accusé a agi involontairement. Dans tous les cas d'automatisme, la défense doit alléguer le caractère involontaire et soumettre une preuve psychiatrique à l'appui de cette allégation. De plus, les antécédents médicaux d'états de dissociation apparentés à l'automatisme, le témoignage corroborant d'observateurs, la preuve d'un mobile, la preuve de l'intensité de l'élément déclencheur ainsi que la question de savoir si la personne qui aurait déclenché l'état d'automatisme est également la victime de la violence qui en a résulté seront également pertinents. Aucun de ces facteurs n'est déterminant en soi. Même si l'imposition à l'accusé d'une charge de preuve en regard d'un élément de l'infraction constitue une restriction de ses droits garantis par l'art. 11d) de la Charte, une telle restriction est nécessaire pour atteindre l'objectif sous-jacent à la présomption du caractère volontaire et peut être justifiée aux termes de l'article premier.

Dès que les fondements de la défense ont été établis, le juge du procès doit déterminer s'il y a lieu de soumettre la défense d'automatisme avec ou sans troubles mentaux à l'appréciation du juge des faits. L'expression « troubles mentaux » est une expression juridique définie au *Code criminel* comme étant une « maladie mentale ». Le juge du procès devrait partir du principe que l'état dans lequel l'accusé allègue avoir été constitue une maladie mentale et, ensuite, déterminer si la preuve soumise fait ressortir l'état allégué de la catégorie de maladie mentale. Il existe deux théories distinctes en matière d'examen de la question de la « maladie mentale ». Suivant la théorie de la « cause interne », la réaction automatique de l'accusé au « choc psychologique » est comparée avec la réaction à laquelle on s'attendrait de la part d'une personne normale dans la même situation. Une défense fondée sur l'automatisme provoqué par un « choc psychologique » exige que la preuve d'un élément déclencheur « extrêmement traumatisant » soit faite avant qu'elle ne puisse être soumise à l'appréciation du juge des faits. Le caractère involontaire dû au simple stress est présumé avoir été déclenché par un facteur propre à l'accusé et, à ce titre, ne donne ouverture qu'à une défense d'automatisme avec troubles mentaux. L'élément objectif de cette comparaison ne viole ni l'art. 7 ni l'art. 11 de la Charte, puisqu'il concerne uniquement la classification de la défense et n'a pas pour effet de modifier la charge de preuve en ce qui a trait au caractère volontaire. Suivant la théorie du « risque subsistant », tout état comportant vraisemblablement la récurrence d'un danger pour le public est considéré comme une maladie mentale. Les facteurs les plus pertinents devant être pris en compte sont les antécédents psychiatriques de l'accusé et la probabilité que l'élément ayant déclenché l'épisode d'automatisme se présente de nouveau. Il conviendrait d'adopter une méthode plus globale, qui s'inspire à la fois de la théorie de la « cause interne » et de la théorie du « risque subsistant » ainsi que des préoccupations d'ordre public.

Lorsque l'état dont souffre l'accusé n'est pas une maladie mentale, seule la défense d'automatisme sans troubles mentaux peut être soumise à l'appréciation du juge des faits, lequel doit alors établir si la défense a prouvé, suivant la prépondérance des probabilités, que l'accusé a agi involontairement. Si son état est une maladie mentale, seule la défense d'automatisme avec troubles mentaux sera soumise à l'appréciation du juge des faits. La défense doit donc démontrer, selon une prépondérance des probabilités, que l'accusé souffrait de troubles mentaux qui l'ont rendu incapable de juger de la nature et de la qualité de l'acte reproché. En tranchant la question, le juge des faits se prononcera par la même occasion sur la question du caractère involontaire.

L'absence de caractère volontaire constitue l'élément juridique principal de l'automatisme. Par conséquent, en déterminant si les fondements d'une défense d'automatisme avaient été établis, le juge du procès aurait dû se de-

mander s'il y avait une preuve que l'accusé s'était trouvé dans un état de conscience diminué où il n'avait pas la maîtrise de ses actes, plutôt que de se demander s'il existait une preuve que l'accusé avait été inconscient tout au long de la perpétration du crime. Les motifs du juge du procès ne révèlaient pas la nature de l'incidence que le facteur de la « cause interne », le facteur du « risque subsistant » et d'autres facteurs d'ordre public ont eu sur sa décision de ne soumettre que la défense d'automatisme avec troubles mentaux à l'appréciation du jury. Il est néanmoins parvenu au bon résultat en ce qui concerne la question de la « maladie mentale ». L'élément déclencheur n'était pas un traumatisme extrême ou un choc psychologique qui provoquerait un état de dissociation chez une personne normale et seule la défense d'automatisme avec troubles mentaux pouvait être soumise au jury. Aucun tort important ni aucune erreur judiciaire grave ne se sont produits.

Les motifs du juge Binnie en ce qui concerne la communication du rapport du psychiatre de la défense sont acceptés.

Les tribunaux d'appel ne devraient pas modifier une sentence à moins qu'elle ne soit inappropriée ou manifestement déraisonnable. Le juge qui a fixé la peine n'a pas commis d'erreur de principe en considérant la provocation comme un facteur atténuant pour les fins de la détermination de la sentence. Pour fixer une peine qui reflète fidèlement la culpabilité morale d'un contrevenant, le juge qui l'inflige doit tenir compte de toutes les circonstances de l'infraction. Ne pas tenir compte d'une défense de provocation reviendrait à ne pas tenir compte d'une preuve probante de l'état d'esprit du contrevenant au moment de l'homicide. Dans les affaires impliquant la provocation, l'art. 232 du *Code criminel* permet au juge de réduire un verdict de meurtre à celui d'homicide involontaire coupable, ce qui lui permet de tenir compte de la défense de provocation pour apprécier la culpabilité morale du contrevenant et de fixer une peine appropriée. L'accusé ne bénéficie pas d'un « double avantage » lors du procès. L'art. 232 confère plutôt à l'accusé l'unique avantage qui consiste en la réduction du verdict afin de permettre la prise en considération du fait que l'homicide a été causé par une provocation pour déterminer la peine appropriée. L'argument du ministère public selon lequel le facteur provocation était épuisé parce qu'il avait déjà contribué à réduire la qualification juridique du crime à l'homicide involontaire coupable ne tenait pas compte de l'objet de l'art. 232 et il doit être rejeté.

Il incombe aux juges d'harmoniser le droit aux valeurs sociales contemporaines. Le meurtre d'un conjoint implique un abus de la confiance reconnue et valorisée par la société et est reconnu comme un important facteur aggravant tant en vertu de l'art. 718.2a)(ii) du *Code criminel* qu'en vertu de la common law. Le juge appelé à prononcer la sentence était au courant du lien matrimonial qui existait entre l'accusé et la victime, et il a entendu la plaidoirie du ministère public sur la peine. Dans ses motifs, il a expressément décrit l'infraction comme étant une infraction de violence familiale et a fait remarquer que la dissuasion générale constituait le but principal de la peine. Le ministère public n'a pas démontré que le juge avait omis de tenir compte du caractère familial de l'infraction.

En réduisant au minimum la disparité entre les peines infligées à des contrevenants similaires ayant commis des infractions similaires, les tribunaux d'appel peuvent fixer des échelles de peines relatives à certaines catégories d'infractions, en vue de guider les tribunaux d'instance inférieure, pourvu que ces catégories et la logique sous-jacente à leur point de départ respectif soient clairement déterminées. Toutefois, il convient de ne pas modifier l'obligation qu'ont les juges de prendre en considération toutes les circonstances pertinentes en infligeant la peine, et aucune échelle précise ne s'applique à toutes les cas. L'argument du ministère public, selon lequel la « double prise en considération » de la provocation avait fait en sorte que l'échelle des peines pour l'homicide involontaire coupable sur la personne d'un conjoint, causé par une provocation, se retrouvait à l'extrémité inférieure de l'éventail des peines infligées pour les homicides involontaires coupables, omettait de reconnaître

que la provocation ne constitue que l'un des nombreux facteurs devant être pris en compte au moment de déterminer quelle est l'extrémité de l'échelle appropriée dans les circonstances d'une affaire particulière. Les caractéristiques personnelles du contrevenant et les autres circonstances entourant l'infraction sont également pertinentes. Le ministère public n'a pas réussi à démontrer le caractère manifestement déraisonnable de l'évaluation des faits de l'affaire et de la jurisprudence pertinente par le juge qui a infligé la peine. Celui-ci était conscient des facteurs aggravants et atténuants et a tenu compte de tous les principes pertinents. Le pourvoi à l'encontre la sentence devrait être rejeté et la sentence confirmée.

Le juge Binnie (dissident) (le juge en chef Lamer et les juges Iacobucci et Major, y souscrivant) : Le juge du procès a correctement appliqué le critère relativement à la charge de présentation. Le témoignage de l'accusé selon laquelle il était inconscient « tout au long de la perpétration du crime » était appuyée par l'opinion du psychiatre de la défense. Le caractère volontaire est une composante de l'exigence de l'*actus reus* de la responsabilité criminelle et suppose un degré de maîtrise consciente. D'un point de vue juridique, le terme « inconscient » signifie que l'accusé ne savait pas ce qu'il faisait. En conséquence, une défense d'automatisme, ou de perte de conscience, met en cause la capacité du ministère public de prouver hors de tout doute raisonnable tous les éléments de l'infraction. Suivant un principe fondamental de droit criminel, une action ou une omission ne peut constituer une infraction criminelle que si elle est volontaire. Une déduction de caractère volontaire ne peut être faite lorsque le juge du procès conclut, comme dans le cas présent, qu'il y a une preuve crédible que l'accusé était inconscient tout au long de la perpétration de l'infraction.

L'automatisme et la provocation sont des concepts distincts et leur application dépend de l'incidence de l'événement déclencheur sur un accusé. L'automatisme est lié à l'absence de caractère volontaire, tandis que la provocation est une reconnaissance qu'un accusé qui a accompli « volontairement » tous les éléments d'un meurtre peut avoir été provoqué par un acte injuste ou une insulte qui auraient privé une personne ordinaire du pouvoir de se maîtriser. La provocation n'est pas prise en compte tant que les éléments subjectifs d'un homicide illégal n'ont pas été établis hors de tout doute raisonnable et ne relève pas le ministère public de son obligation d'établir tous les éléments de sa preuve. Elle a simplement pour effet de réduire une cause de meurtre établie en homicide involontaire coupable. Un comportement insuffisant pour constituer de la provocation ne devrait pas être admis à fonder une défense d'automatisme sans aliénation mentale, laquelle peut mener à l'acquittement complet.

Imposer à l'accusé une charge de persuasion ou une charge ultime consistant à établir l'automatisme selon la prépondérance des probabilités représenterait un changement aux principes juridiques et violerait la présomption d'innocence garantie par l'art. 11d) de la Charte. L'imposition d'une charge de présentation ne signifie pas qu'un accusé assume une partie de la charge de persuasion. Le législateur a choisi d'imposer une charge de persuasion selon la prépondérance des probabilités dans le cas de l'automatisme avec aliénation mentale, mais pas dans celui de l'automatisme sans aliénation mentale. Cette Cour ne devrait pas prendre l'initiative d'inverser la charge de persuasion au détriment de l'accusé. Une telle inversion créerait un risque d'injustice et nécessiterait une justification au sens de l'article premier. La charge de persuasion consistant à établir l'inexistence de l'état d'esprit allégué par l'accusé continue d'incomber au ministère public.

La véritable question qui se pose lors de l'examen de la maladie mentale est celle de savoir si les facultés mentales de l'accusé sont si gravement diminuées qu'elles le rendent « incapable de juger de la nature et de la qualité de l'acte ou de l'omission, ou de savoir que l'acte ou l'omission était mauvais ». Ces conséquences visent clairement des questions autres que le caractère volontaire. Les problèmes conceptuels liés à la théorie de la « cause interne », sur laquelle le ministère public se fondait en plaidant que l'état de « dissociation » de l'accusé était une

« maladie mentale » et était assujetti à l'art. 16 du *Code criminel*, justifiaient amplement qu'on ramène celle-ci au statut d'instrument d'analyse. De plus, un cas isolé de comportement violent soulève des questions d'ordre public différentes de celles soulevées par un comportement résultant d'une autre maladie mentale. Par conséquent, le risque de récurrence fait légitimement partie de l'élément politique de sécurité public de l'analyse juridique de la « maladie mentale ». Dans les cas où, comme dans le cas présent, les experts ont convenu de l'absence de maladie mentale, et que la seule justification pour imputer le comportement de l'accusé à des troubles mentaux était leur incapacité d'identifier une cause "externe" à son automatisme, il n'existait aucune justification permettant de transférer à la défense la charge de persuasion du ministère public, ni de soustraire à l'appréciation du jury la question de l'automatisme sans troubles mentaux. Il était également incorrect d'avoir obligé l'accusé à substituer à la défense du caractère involontaire qu'il avait choisie la défense d'aliénation mentale qui est tout à fait différente sur le plan conceptuel. L'examen, prévu par la loi, de la question de savoir si l'accusé était atteint de troubles mentaux qui le rendaient incapable de juger de la nature et de la qualité de son acte, ou de savoir que ce dernier était mauvais, était une question de nature qualitative non liée à son allégation d'inconscience.

Les tribunaux doivent respecter l'attribution par le législateur au jury de la tâche d'évaluer la crédibilité et de tirer des conclusions de fait. Après qu'il se soit acquitté de sa charge de présentation, l'accusé avait droit au verdict du jury quant à savoir si son comportement, quoique sensé, était involontaire. L'omission de soumettre la question du caractère volontaire au jury a eu pour effet de priver l'accusé du bénéfice d'une décision lui étant favorable en matière de preuve et violait les art. 11d) et f) de la Charte. Le ministère public ayant échappé à la seule véritable contestation de sa preuve, l'accusé avait droit à un nouveau procès.

Un rapport préparé par un expert de la défense est normalement protégé et ne peut faire l'objet d'une ordonnance de communication. L'accusé, par l'intermédiaire de son avocat, a renoncé à ce privilège lors de l'ouverture de la preuve de la défense. Ayant communiqué les parties du rapport du psychiatre qui étaient favorables à l'accusé, l'avocat de la défense ne pouvaient donc pas dissimuler les autres parties du document susceptibles de contredire ou qualifier ce qui avait été révélé. D'un autre côté, appeler l'expert à la barre constituerait une renonciation à tout privilège se rattachant à son rapport. Un témoin qui se présente à la barre ne donne non plus des conseils confidentiels à une partie, mais une opinion pour assister le tribunal, et la partie adverse doit avoir accès aux fondements de cette opinion pour vérifier adéquatement son exactitude. C'est donc à juste titre que le juge du procès a ordonné la production du rapport en entier à la fin de l'exposé initial de la défense. Compte tenu que de toute façon le rapport aurait été communiqué dès le moment où l'expert de la défense se serait présenté à la barre des témoins, sa communication prématurée forcée n'avait eu aucune incidence importante sur l'issue du procès, ni engendré d'erreur judiciaire.

Si la conclusion de rejeter le pourvoi à l'encontre de la déclaration de culpabilité du juge Bastarache avait été partagée, sa décision de rejeter le pourvoi à l'encontre de la peine aurait également été partagée pour les motifs énoncés.

Cases considered by/Jurisprudence citée par *Binnie J.* (dissenting) (*Lamer C.J.C., Iacobucci* and *Major JJ.* concurring):

Bratty v. Attorney-General for Northern Ireland, [1961] 3 All E.R. 523, [1963] A.C. 386, 46 Cr. App. R. 1 (U.K. H.L.) — considered

Hawkins v. R. (1994), 72 A. Crim. R. 288, 179 C.L.R. 500, 68 A.L.J.R. 572, 122 A.L.R. 27 (Australia H.C.) — referred to

1999 CarswellBC 1064, [1999] 2 S.C.R. 290, 24 C.R. (5th) 1, 239 N.R. 201, 63 C.R.R. (2d) 43, 173 D.L.R. (4th) 66, 134 C.C.C. (3d) 353, 123 B.C.A.C. 1, 201 W.A.C. 1, 1999 CarswellBC 1065, [1999] S.C.J. No. 27, REJB 1999-12568, J.E. 99-1128

Hill v. Baxter (1957), [1958] 1 Q.B. 277, [1958] 1 All E.R. 193 (Eng. Q.B.) — considered

Hodgkinson v. Simms (1988), 33 B.C.L.R. (2d) 129, 36 C.P.C. (2d) 24, 55 D.L.R. (4th) 577, [1989] 3 W.W.R. 132, 47 C.C.L.T. 94 (B.C. C.A.) — considered

McNaughten's Case, Re (1843), 8 E.R. 718, 4 State Tr. N.S. 847, 1 State Tr. 314, 1 Car. & K. 130n, 8 Scott N.R. 595, 10 Cl. & Fin. 200, [1843-1860] All E.R. Rep. 229 (U.K. H.L.) — referred to

Police v. Bannin, [1991] 2 N.Z.L.R. 237 (New Zealand H.C.) — referred to

R. v. Bernard, 67 C.R. (3d) 113, 32 O.A.C. 161, [1988] 2 S.C.R. 833, 90 N.R. 321, 45 C.C.C. (3d) 1, 38 C.R.R. 82 (S.C.C.) — considered

R. c. Brouillette, [1992] R.J.Q. 2776, (sub nom. *R. v. Peruta)* 78 C.C.C. (3d) 350, 51 Q.A.C. 79 (Que. C.A.) — referred to

R. v. Burgess, [1991] 2 All E.R. 769 (Eng. C.A.) — considered

R. v. Cameron (1992), 71 C.C.C. (3d) 272, 7 O.R. (3d) 545, 12 C.R. (4th) 396, 9 C.R.R. (2d) 357, 55 O.A.C. 234 (Ont. C.A.) — considered

R. v. Chaulk (1990), 2 C.R. (4th) 1, 62 C.C.C. (3d) 193, 69 Man. R. (2d) 161, [1991] 2 W.W.R. 385, 1 C.R.R. (2d) 1, 119 N.R. 161, [1990] 3 S.C.R. 1303 (S.C.C.) — considered

R. v. Corbett, [1988] 1 S.C.R. 670, [1988] 4 W.W.R. 481, 85 N.R. 81, 28 B.C.L.R. (2d) 145, 41 C.C.C. (3d) 385, 64 C.R. (3d) 1, 34 C.R.R. 54 (S.C.C.) — considered

R. v. Cottle, [1958] N.Z.L.R. 999 — referred to

R. c. Daviault, 33 C.R. (4th) 165, 24 C.R.R. (2d) 1, 93 C.C.C. (3d) 21, [1994] 3 S.C.R. 63, 173 N.R. 1, 118 D.L.R. (4th) 469, 64 Q.A.C. 81 (S.C.C.) — considered

R. v. Falconer (1990), 50 A. Crim. R. 244 (Australia H.C.) — considered

R. v. Hennessy, [1989] 2 All E.R. 9, 89 Cr. App. R. 10 (Eng. C.A.) — considered

R. v. Hill (1985), 27 D.L.R. (4th) 187, 68 N.R. 161, 17 O.A.C. 33, 51 C.R. (3d) 97, 25 C.C.C. (3d) 322, [1986] 1 S.C.R. 313 (S.C.C.) — referred to

R. v. K. (1970), [1971] 2 O.R. 401, 3 C.C.C. (2d) 84 (Ont. H.C.) — considered

R. v. Kemp (1956), [1957] 1 Q.B. 399, 73 L.Q.R. 12, 20 M.L.R. 55, [1956] 3 All E.R. 249 (Eng. Q.B.) — considered

R. v. Latour (1950), [1951] S.C.R. 19, 98 C.C.C. 258, 11 C.R. 1, [1951] 1 D.L.R. 834 (S.C.C.) — referred to

R. v. Lavallee, [1990] 4 W.W.R. 1, 67 Man. R. (2d) 1, [1990] 1 S.C.R. 852, 108 N.R. 321, 76 C.R. (3d) 329, 55 C.C.C. (3d) 97 (S.C.C.) — referred to

R. v. Leary (1977), [1978] 1 S.C.R. 29, 37 C.R.N.S. 60, [1977] 2 W.W.R. 628, 13 N.R. 592, 33 C.C.C. (2d) 473, 74 D.L.R. (3d) 103 (S.C.C.) — considered

R. v. Linney (1977), [1978] 1 S.C.R. 646, [1977] 2 W.W.R. 158, 13 N.R. 217, 32 C.C.C. (2d) 294, 73 D.L.R. (3d) 4 (S.C.C.) — referred to

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R. v. MacLeod (1980), 52 C.C.C. (2d) 193 (B.C. C.A.) — considered

R. v. Martineau, [1990] 6 W.W.R. 97, 112 N.R. 83, 58 C.C.C. (3d) 353, 76 Alta. L.R. (2d) 1, 79 C.R. (3d) 129, 50 C.R.R. 110, 109 A.R. 321, [1990] 2 S.C.R. 633 (S.C.C.) — referred to

R. v. Osolin, 26 C.R. (4th) 1, 38 B.C.A.C. 81, 62 W.A.C. 81, 86 C.C.C. (3d) 481, [1993] 4 S.C.R. 595, 162 N.R. 1, 109 D.L.R. (4th) 478, 19 C.R.R. (2d) 93 (S.C.C.) — referred to

R. v. Parks, 140 N.R. 161, 75 C.C.C. (3d) 287, [1992] 2 S.C.R. 871, 95 D.L.R. (4th) 27, 15 C.R. (4th) 289, 55 O.A.C. 241 (S.C.C.) — considered

R. v. Parnerkar (1973), [1974] S.C.R. 449, 10 C.C.C. (2d) 253, 21 C.R.N.S. 129, [1973] 4 W.W.R. 298, 33 D.L.R. (3d) 683 (S.C.C.) — considered

R. v. Quick, [1973] Q.B. 910, [1973] 3 W.L.R. 26, [1973] Crim. L.R. 434, [1973] 3 All E.R. 347, 57 Cr. App. R. 722 (Eng. C.A.) — considered

R. v. Rabey (1977), 17 O.R. (2d) 1, 79 D.L.R. (3d) 414, 40 C.R.N.S. 46, 1 L. Med. Q. 280, 37 C.C.C. (2d) 461 (Ont. C.A.) — considered

R. v. Rabey, [1980] 2 S.C.R. 513, 15 C.R. (3d) 225 (Eng.), 20 C.R. (3d) 1 (Fr.), 32 N.R. 451, 114 D.L.R. (3d) 193, 54 C.C.C. (2d) 1 (S.C.C.) — considered

R. v. Schwartz (1988), [1989] 1 W.W.R. 289, [1988] 2 S.C.R. 443, 55 D.L.R. (4th) 1, 88 N.R. 90, 56 Man. R. (2d) 92, 45 C.C.C. (3d) 97, 66 C.R. (3d) 251, 39 C.R.R. 260 (S.C.C.) — considered

R. v. Sullivan (1983), [1984] A.C. 156, [1983] 2 All E.R. 673, [1983] Crim. L.R. 740, [1983] 3 W.L.R. 123 (U.K. H.L.) — referred to

R. v. Swain, 63 C.C.C. (3d) 481, 125 N.R. 1, 3 C.R.R. (2d) 1, 47 O.A.C. 81, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253 (S.C.C.) — considered

R. v. Szymusiak, [1972] 3 O.R. 602, 19 C.R.N.S. 373, 8 C.C.C. (2d) 407 (Ont. C.A.) — considered

R. v. Théroux, 19 C.R. (4th) 194, 79 C.C.C. (3d) 449, 151 N.R. 104, 54 Q.A.C. 184, 100 D.L.R. (4th) 624, [1993] 2 S.C.R. 5 (S.C.C.) — considered

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1999 CarswellBC 1064, [1999] 2 S.C.R. 290, 24 C.R. (5th) 1, 239 N.R. 201, 63 C.R.R. (2d) 43, 173 D.L.R. (4th) 66, 134 C.C.C. (3d) 353, 123 B.C.A.C. 1, 201 W.A.C. 1, 1999 CarswellBC 1065, [1999] S.C.J. No. 27, REJB 1999-12568, J.E. 99-1128

R. v. Tolson (1889), 23 Q.B.D. 168, 16 Cox C.C. 629 (Eng. Q.B.) — referred to

State v. Hinkle (1986), 489 S.E.2d 257, 200 W. Va. 280 — referred to

Cases considered by/Jurisprudence citée par *Bastarache J.* (*L'Heureux-Dubé, Gonthier, Cory* and *McLachlin JJ.* concurring):

Bratty v. Attorney-General for Northern Ireland, [1961] 3 All E.R. 523, [1963] A.C. 386, 46 Cr. App. R. 1 (U.K. H.L.) — considered

Brooks v. Canada Safeway Ltd., 26 C.C.E.L. 1, [1989] 1 S.C.R. 1219, [1989] 4 W.W.R. 193, 59 D.L.R. (4th) 321, 94 N.R. 373, 58 Man. R. (2d) 161, 89 C.L.L.C. 17,012, 45 C.R.R. 115, 10 C.H.R.R. D/6183, C.E.B. & P.G.R. 8126 (S.C.C.) — referred to

Canada (Director of Investigation & Research) v. Southam Inc., 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199 (S.C.C.) — referred to

Fulcher v. State (1981), 633 P.2d 142 — referred to

General Electric Co. v. Joiner (1997), 522 U.S. 136, 66 U.S.L.W. 4036, 118 S. Ct. 512 (U.S. Ga.) — considered

Hill v. Baxter (1957), [1958] 1 Q.B. 277, [1958] 1 All E.R. 193 (Eng. Q.B.) — considered

Hodgkinson v. Simms (1988), 33 B.C.L.R. (2d) 129, 36 C.P.C. (2d) 24, 55 D.L.R. (4th) 577, [1989] 3 W.W.R. 132, 47 C.C.L.T. 94 (B.C. C.A.) — referred to

Polston v. State (1984), 685 P.2d 1 — referred to

R. v. Archibald (1992), 15 B.C.A.C. 301, 27 W.A.C. 301 (B.C. C.A.) — considered

R. v. Bevan, 21 C.R. (4th) 277, 154 N.R. 245, 82 C.C.C. (3d) 310, 64 O.A.C. 165, 104 D.L.R. (4th) 180, [1993] 2 S.C.R. 599 (S.C.C.) — referred to

R. c. Brouillette, [1992] R.J.Q. 2776, (sub nom. *R. v. Peruta)* 78 C.C.C. (3d) 350, 51 Q.A.C. 79 (Que. C.A.) — referred to

R. v. Brown (1992), 125 A.R. 150, 14 W.A.C. 150, 73 C.C.C. (3d) 242, 13 C.R. (4th) 346, (sub nom. *R. v. Highway)* [1993] 1 C.N.L.R. 116 (Alta. C.A.) — referred to

R. v. Cameron (1992), 71 C.C.C. (3d) 272, 7 O.R. (3d) 545, 12 C.R. (4th) 396, 9 C.R.R. (2d) 357, 55 O.A.C. 234 (Ont. C.A.) — considered

R. v. Campbell (1991), 70 Man. R. (2d) 158 (Man. C.A.) — referred to

R. v. Chaulk (1990), 2 C.R. (4th) 1, 62 C.C.C. (3d) 193, 69 Man. R. (2d) 161, [1991] 2 W.W.R. 385, 1 C.R.R. (2d) 1, 119 N.R. 161, [1990] 3 S.C.R. 1303 (S.C.C.) — referred to

R. v. Cottle, [1958] N.Z.L.R. 999 — referred to

R. v. Creighton, 23 C.R. (4th) 189, 157 N.R. 1, 65 O.A.C. 321, 105 D.L.R. (4th) 632, 83 C.C.C. (3d) 346, [1993] 3 S.C.R. 3, 17 C.R.R. (2d) 1 (S.C.C.) — referred to

R. c. Daviault, 33 C.R. (4th) 165, 24 C.R.R. (2d) 1, 93 C.C.C. (3d) 21, [1994] 3 S.C.R. 63, 173 N.R. 1, 118 D.L.R. (4th) 469, 64 Q.A.C. 81 (S.C.C.) — considered

R. v. Doyle (1991), 108 N.S.R. (2d) 1, 294 A.P.R. 1 (N.S. C.A.) — referred to

R. v. Edwards (1996), 46 C.R. (4th) 319, 88 O.A.C. 217, 105 C.C.C. (3d) 21, 28 O.R. (3d) 54 (Ont. C.A.) — referred to

R. v. Eklund (September 10, 1985), Doc. Vancouver CA003258 (B.C. C.A.) — referred to

R. v. Falconer (1990), 50 A. Crim. R. 244 (Australia H.C.) — considered

R. v. Jackson (1996), 106 C.C.C. (3d) 557, 184 A.R. 93, 122 W.A.C. 93, 48 C.R. (4th) 357 (Alta. C.A.) — referred to

R. v. K. (1970), [1971] 2 O.R. 401, 3 C.C.C. (2d) 84 (Ont. H.C.) — considered

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R. v. Lavallee, [1990] 4 W.W.R. 1, 67 Man. R. (2d) 1, [1990] 1 S.C.R. 852, 108 N.R. 321, 76 C.R. (3d) 329, 55 C.C.C. (3d) 97 (S.C.C.) — referred to

R. v. M. (C.A.), 46 C.R. (4th) 269, 194 N.R. 321, 105 C.C.C. (3d) 327, 73 B.C.A.C. 81, 120 W.A.C. 81, [1996] 1 S.C.R. 500 (S.C.C.) — considered

R. v. M. (T.E.), (sub nom. *R. v. McDonnell)* 210 N.R. 241, (sub nom. *R. v. McDonnell)* 114 C.C.C. (3d) 436, (sub nom. *R. v. McDonnell)* 145 D.L.R. (4th) 577, (sub nom. *R. v. McDonnell)* 196 A.R. 321, (sub nom. *R. v. McDonnell)* 141 W.A.C. 321, 49 Alta. L.R. (3d) 111, (sub nom. *R. v. McDonnell)* [1997] 1 S.C.R. 948, 6 C.R. (5th) 231, [1997] 7 W.W.R. 44, (sub nom. *R. v. McDonnell)* 43 C.R.R. (2d) 189 (S.C.C.) — considered

R. v. MacLeod (1980), 52 C.C.C. (2d) 193 (B.C. C.A.) — considered

R. v. Martineau, [1990] 6 W.W.R. 97, 112 N.R. 83, 58 C.C.C. (3d) 353, 76 Alta. L.R. (2d) 1, 79 C.R. (3d) 129, 50 C.R.R. 110, 109 A.R. 321, [1990] 2 S.C.R. 633 (S.C.C.) — referred to

R. v. Parks, 140 N.R. 161, 75 C.C.C. (3d) 287, [1992] 2 S.C.R. 871, 95 D.L.R. (4th) 27, 15 C.R. (4th) 289, 55 O.A.C. 241 (S.C.C.) — applied

R. v. Pitkeathly (1994), 69 O.A.C. 352, 29 C.R. (4th) 182 (Ont. C.A.) — referred to

R. v. Rabey (1977), 17 O.R. (2d) 1, 79 D.L.R. (3d) 414, 40 C.R.N.S. 46, 1 L. Med. Q. 280, 37 C.C.C. (2d) 461 (Ont. C.A.) — considered

R. v. Rabey, [1980] 2 S.C.R. 513, 15 C.R. (3d) 225 (Eng.), 20 C.R. (3d) 1 (Fr.), 32 N.R. 451, 114 D.L.R. (3d) 193, 54 C.C.C. (2d) 1 (S.C.C.) — applied

R. v. Seaboyer, 7 C.R. (4th) 117, 4 O.R. (3d) 383, 48 O.A.C. 81, 128 N.R. 81, 6 C.R.R. (2d) 35, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193 (S.C.C.) — referred to

R. v. Shropshire, 43 C.R. (4th) 269, 102 C.C.C. (3d) 193, 188 N.R. 284, 129 D.L.R. (4th) 657, 65 B.C.A.C. 37, 106 W.A.C. 37, [1995] 4 S.C.R. 227 (S.C.C.) — applied

R. v. Swain, 63 C.C.C. (3d) 481, 125 N.R. 1, 3 C.R.R. (2d) 1, 47 O.A.C. 81, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253 (S.C.C.) — considered

R. v. Szymusiak, [1972] 3 O.R. 602, 19 C.R.N.S. 373, 8 C.C.C. (2d) 407 (Ont. C.A.) — considered

R. v. Théroux, 19 C.R. (4th) 194, 79 C.C.C. (3d) 449, 151 N.R. 104, 54 Q.A.C. 184, 100 D.L.R. (4th) 624, [1993] 2 S.C.R. 5 (S.C.C.) — considered

R. v. Woermann (1992), 81 Man. R. (2d) 255, 30 W.A.C. 255 (Man. C.A.) — referred to

State v. Caddell (1975), 287 N.C. 266, 215 S.E.2d 348 — referred to

State v. Fields (1989), 324 N.C. 204, 376 S.E.2d 740 — referred to

Weatherall v. Canada (Attorney General), 23 C.R. (4th) 1, (sub nom. *Conway v. Canada)* 154 N.R. 392, [1993] 2 S.C.R. 872, 16 C.R.R. (2d) 256, (sub nom. *Conway v. Canada (Attorney General))* 83 C.C.C. (3d) 1, 105 D.L.R. (4th) 210, (sub nom. *Conway v. Canada)* 64 F.T.R. 306 (note) (S.C.C.) — considered

Statutes considered by/Législation citée par *Binnie J.* (dissenting) (*Lamer C.J.C., Iacobucci* and *Major JJ.* concurring):

Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

Generally/en général — referred to

s. 1 — referred to

s. 7 — referred to

s. 11(d) — considered

s. 11(f) — referred to

Criminal Code/Code criminel, R.S.C./L.R.C. 1985, c. C-46

Pt. XX.1 [en./aj. 1991, c. 43, s. 4] — referred to

s. 2 "mental disorder" [en/aj. 1991, c. 43, s. 1] — referred to

s. 16 [rep. & sub./abr. et rempl. 1991, c. 43, s. 2] — considered

s. 16(1) [rep. & sub./abr. et rempl. 1991, c. 43, s. 2] — considered

1999 CarswellBC 1064, [1999] 2 S.C.R. 290, 24 C.R. (5th) 1, 239 N.R. 201, 63 C.R.R. (2d) 43, 173 D.L.R. (4th) 66, 134 C.C.C. (3d) 353, 123 B.C.A.C. 1, 201 W.A.C. 1, 1999 CarswellBC 1065, [1999] S.C.J. No. 27, REJB 1999-12568, J.E. 99-1128

s. 16(4) — considered

s. 34 — referred to

s. 232 — considered

s. 265(4) — referred to

s. 686 [am./mod. R.S.C. 1985, c. 27 (1st Supp.), s. 145; 1991, c. 43, s. 9 (Sched., item 8)] — referred to

s. 686(1)(b)(iii) [am./mod. R.S.C. 1985, c. 27 (1st Supp.), s. 145(1)] — referred to

Statutes considered by/Législation citée par *Bastarache J.* (*L'Heureux-Dubé, Gonthier, Cory* and *McLachlin JJ.* concurring):

Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

s. 1 — referred to

s. 7 — considered

s. 11(d) — considered

Criminal Code/Code criminel, R.S.C./L.R.C. 1985, c. C-46

Generally/en général — referred to

Pt. XX.1 [en./aj. 1991, c. 43, s. 4] — referred to

s. 2 "mental disorder" [en/aj. 1991, c. 43, s. 1] — considered

s. 16 [rep. & sub./abr. et rempl. 1991, c. 43, s. 2] — considered

s. 232 — considered

s. 235 — referred to

s. 236 [rep. & sub./abr. et rempl. 1995, c. 39, s. 142] — referred to

s. 672.34 [en./aj. 1991, c. 43, s. 4] — considered

s. 672.54 [en./aj. 1991, c. 43, s. 4] — considered

s. 686(1)(b)(iii) [am./mod. R.S.C. 1985, c. 27 (1st Supp.), s. 145(1)] — referred to

s. 687(1) — considered

s. 718.2(a)(ii) [en./aj. 1995, c. 22, s. 6] — considered

1999 CarswellBC 1064, [1999] 2 S.C.R. 290, 24 C.R. (5th) 1, 239 N.R. 201, 63 C.R.R. (2d) 43, 173 D.L.R. (4th) 66, 134 C.C.C. (3d) 353, 123 B.C.A.C. 1, 201 W.A.C. 1, 1999 CarswellBC 1065, [1999] S.C.J. No. 27, REJB 1999-12568, J.E. 99-1128

Words and phrases considered

AUTOMATISM

I . . . define automatism as a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action.

Two forms of automatism are recognized at law: insane automatism and non-insane automatism. Involuntary action which does not stem from a disease of the mind gives rise to a claim of non-insane automatism. If successful, a claim of non-insane automatism entitles the accused to an acquittal.

On the other hand, involuntary action which is found, at law, to result from a disease of the mind gives rise to a claim of insane automatism. It has long been recognized that insane automatism is subsumed by the defence of mental disorder, formerly referred to as the defence of insanity.

. . . it is important to recognize that in actuality true "automatism" only includes involuntary behaviour which does not stem from a disease of the mind.

AUTOMATISM

The two concepts [of automatism and provocation] are quite distinct and their application depends on the nature of the impact on an accused of the triggering event.

[

. . . . .

]

The key distinction between the two concepts is that automatism relates to a lack of voluntariness in the accused, an essential element of the offence, while provocation is a recognition that an accused who "voluntarily" committed all the elements of murder may nevertheless have been provoked by a wrongful act or insult that would have been sufficient, on an objective basis, to deprive an ordinary person of the power of self-control. . . . Provocation simply operates, where applicable, to reduce murder to manslaughter. Thus, while evidence relating to the events preceding the commission of an offence may raise questions about both automatism and provocation, very different proof of facts must be made before either one of these issues can be left with the jury.

DISEASE OF THE MIND

Taken alone, the question of what mental conditions are included in the term disease of the mind is a question of law. However, the trial judge must also determine whether the condition the accused claims to have suffered from satisfies the legal test for disease of the mind. This involves an assessment of the particular evidence in the case rather than a general principle of law and is thus a question of mixed law and fact

MENTAL DISORDER

Mental disorder is a legal term. It is defined in s. 2 of the [*Criminal Code*, R.S.C. 1985, c. C-46] as "a disease of the mind".

1999 CarswellBC 1064, [1999] 2 S.C.R. 290, 24 C.R. (5th) 1, 239 N.R. 201, 63 C.R.R. (2d) 43, 173 D.L.R. (4th) 66, 134 C.C.C. (3d) 353, 123 B.C.A.C. 1, 201 W.A.C. 1, 1999 CarswellBC 1065, [1999] S.C.J. No. 27, REJB 1999-12568, J.E. 99-1128

PROVOCATION

The two concepts [of automatism and provocation] are quite distinct and their application depends on the nature of the impact on an accused of the triggering event.

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The key distinction between the two concepts is that automatism relates to a lack of voluntariness in the accused, an essential element of the offence, while provocation is a recognition that an accused who "voluntarily" committed all the elements of murder may nevertheless have been provoked by a wrongful act or insult that would have been sufficient, on an objective basis, to deprive an ordinary person of the power of self-control. . . . Provocation simply operates, where applicable, to reduce murder to manslaughter. Thus, while evidence relating to the events preceding the commission of an offence may raise questions about both automatism and provocation, very different proof of facts must be made before either one of these issues can be left with the jury.

UNCONSCIOUSNESS

The concepts of unconsciousness and involuntariness are linked in the definition of automatism proposed by the Ontario High Court of Justice in *R. v. K.* (1970), 3 C.C.C. (2d) 84 (Ont. H.C.), at p. 84, and adopted by a majority in this court in [*R. v. Rabey*, [1980] 2 S.C.R. 513 (S.C.C.)].

From the legal perspective, "unconsciousness" is used in the sense that the accused, like the sleepwalker, is shown "not to have known what he was doing". . . . This excludes the person who is provoked and says, "I couldn't help myself", or who simply professes to be at a loss to explain uncharacteristic conduct.

Termes et locutions cités

Automatisme

Je . . . définir l'automatisme comme étant un état de conscience diminué, plutôt qu'une perte de conscience, dans lequel la personne, quoique capable d'agir, n'a pas la maîtrise de ses actes.

Le droit reconnaît deux formes d'automatisme: l'automatisme avec aliénation mentale et l'automatisme sans aliénation mentale. L'acte involontaire qui n'est pas le fruit d'une maladie mentale donne ouverture à la défense d'automatisme sans aliénation mentale. Si ce moyen de défense est retenu, l'accusé a droit à l'acquittement.

Par ailleurs, l'acte involontaire qui, en droit, est jugé résulter d'une maladie mentale donne ouverture à la défense d'automatisme avec aliénation mentale. Il est reconnu depuis longtemps que ce moyen est subsumé sous la défense des troubles mentaux auparavant appelée « défense d'aliénation mentale ».

Troubles mentaux

L'expression « troubles mentaux » est une expression juridique définie à l'art. 2 du [*Code criminel*, L.R.C. 1985, ch. C-46] comme étant une « maladie mentale ».

MALADIE MENTALE

Prise isolément, la question de savoir quels états mentaux sont englobés par l'expression « maladie mentale » est une question de droit. Toutefois, le juge du procès doit également déterminer si l'état dans lequel l'accusé

prétend s'être trouvé satisfait au critère juridique de la maladie mentale. Il lui faut alors évaluer la preuve présentée dans l'affaire dont il est saisi, au lieu d'un principe général de droit, de sorte qu'il s'agit d'une question mixte de droit et de fait.

CONSCIENCE

Les notions de perte de conscience et de caractère involontaire sont liées dans la définition d'automatisme proposée par la Haute Cour de justice de l'Ontario dans *R. c. K.* (1970), 3 C.C.C. (2d) 84, à la p. 84, et adoptée par notre Cour à la majorité dans l'arrêt [*Rabey*, [1980] 2 R.C.S. 513].

Sur le plan juridique, l'expression « perte de conscience »est utilisée dans le sens qu'il est démontré que l'accusé, comme le somnambule, [TRADUCTION] « ne savait pas ce qu'il faisait ». . . . Cela exclut la personne qui agit sous le coup de la provocation et dit « Je n'ai pas pu m'en empêcher », ou qui affirme simplement qu'elle est incapable d'expliquer un comportement qui ne lui ressemble pas.

AUTOMATISME

Ce sont deux notions [l'automatisme et la provocation] tout à fait distinctes, dont l'application dépend de l'incidence qu'a eu l'élément déclencheur sur l'accusé.

. . . . .

La distinction fondamentale entre les deux notions est que l'automatisme est lié à l'absence de caractère volontaire chez l'accusé, qui constitue un élément essentiel de l'infraction, alors que la provocation est une reconnaissance que l'accusé qui a accompli « volontairement » tous les éléments d'un meurtre peut néanmoins avoir été provoqué par un acte injuste ou une insulte qui auraient été objectivement suffisants pour priver une personne ordinaire du pouvoir de se maîtriser. . . . La provocation a seulement pour effet, le cas échéant, de réduire le meurtre à un homicide involontaire coupable. Par conséquent, bien que la preuve des événements qui ont précédé la perpétration de l'infraction puisse soulever des questions tant sur l'automatisme que sur la provocation, une preuve des faits très différente est requise pour que l'un ou l'autre de ces questions puisse être soumise à l'appréciation du jury.

PROVOCATION

Ce sont deux notions [l'automatisme et la provocation] tout à fait distinctes, dont l'application dépend de l'incidence qu'a eu l'élément déclencheur sur l'accusé.

. . . . .

La distinction fondamentale entre les deux notions est que l'automatisme est lié à l'absence de caractère volontaire chez l'accusé, qui constitue un élément essentiel de l'infraction, alors que la provocation est une reconnaissance que l'accusé qui a accompli « volontairement » tous les éléments d'un meurtre peut néanmoins avoir été provoqué par un acte injuste ou une insulte qui auraient été objectivement suffisants pour priver une personne ordinaire du pouvoir de se maîtriser. . . . La provocation a seulement pour effet, le cas échéant, de réduire le meurtre à un homicide involontaire coupable. Par conséquent, bien que la preuve des événements qui ont précédé la perpétration de l'infraction puisse soulever des questions tant sur l'automatisme que sur la provocation, une preuve des faits très différente est requise pour que l'un ou l'autre de ces questions puisse être soumise à l'appréciation du jury.

1999 CarswellBC 1064, [1999] 2 S.C.R. 290, 24 C.R. (5th) 1, 239 N.R. 201, 63 C.R.R. (2d) 43, 173 D.L.R. (4th) 66, 134 C.C.C. (3d) 353, 123 B.C.A.C. 1, 201 W.A.C. 1, 1999 CarswellBC 1065, [1999] S.C.J. No. 27, REJB 1999-12568, J.E. 99-1128

APPEAL by accused from judgment reported at (1997), 6 C.R. (5th) 367, 86 B.C.A.C. 169, 141 W.A.C. 169, 113 C.C.C. (3d) 158 (B.C. C.A.), dismissing appeal from conviction for manslaughter; APPEAL by Crown from judgment reported at (1997), 89 B.C.A.C. 139, 145 W.A.C. 139 (B.C. C.A.), dismissing appeal from sentence.

POURVOI formé par l'accusé à l'encontre de l'arrêt publié à (1997), 6 C.R. (5th) 367, 86 B.C.A.C. 169, 141 W.A.C. 169, 141 W.A.C. 169, 113 C.C.C. (3d) 158, [1997] B.C.J. No. 179 (QL), ayant rejeté l'appel de la déclaration de culpabilité pour homicide involontaire coupable; POURVOI formé par le ministère public à l'encontre de l'arrêt publié à (1997), 89 B.C.A.C. 139, 145 W.A.C. 139, [1997] B.C.J. No. 694 (QL), ayant rejeté l'appel de la sentence.

Binnie J. **(dissenting) (*Lamer C.J.C., Iacobucci* and *Major JJ.* concurring):**

1 A fundamental principle of the criminal law is that no act can be a criminal offence unless it is performed or omitted voluntarily. In this case the appellant acknowledges that he killed his wife. He stabbed her 47 times with his knife in a frenzy. His defence was that he lost consciousness when his mind snapped under the weight of verbal abuse which the defence psychiatrist characterized as" exceptionally cruel" and "psychologically sadistic". The trial judge ruled in favour of the appellant that "there is evidence of unconsciousness throughout the commission of the crime", and the British Columbia Court of Appeal agreed ((1997), 86 B.C.A.C. 169 (B.C. C.A.), at p. 173) that "a properly instructed jury, acting reasonably, could find some form of automatism".

2 The appellant had elected trial by jury. He says he was entitled to have the issue of voluntariness, thus properly raised, determined by the jury. He says that there was no proper legal basis for the courts in British Columbia to deprive him of the benefit of an evidentiary ruling which put in issue the Crown's ability to prove the *actus reus* of the offence.

3 The trial judge ruled that the evidence of involuntariness was only relevant (if at all) to a defence of not criminally responsible by reason of mental disorder (NCRMD). This was upheld by the Court of Appeal. When it is appreciated that all of the experts agreed the appellant did not suffer from any condition that medicine would classify as a disease of the mind, it is perhaps not surprising that the jury found the accused to be sane. He was convicted of manslaughter. The contention of the appellant that the act of killing, while not the product of a mentally disordered mind, was nevertheless involuntary, was never put to the jury.

4 The appellant argues that the judicial reasoning that effectively took the issue of voluntariness away from the jury violates the presumption of his innocence and his entitlement to the benefit of a jury trial guaranteed by s. 11(*d*) and (*f*) and is not saved by s. 1 of the *Canadian Charter of Rights and Freedoms*.

5 The appellant also objects to the compelled disclosure of his psychiatrist's expert report to the Crown contrary, he says, to his claim of privilege. His argument is that the result of such disclosure was to conscript against him his own description of events to the defence psychiatrist, thereby violating his right to remain silent.

6 In my view, it follows from the concurrent findings in the courts below (that the appellant successfully put in issue his consciousness at the time of the offence) that he was entitled to the jury's verdict on whether or not his conduct, though sane, was involuntary. That issue having been withdrawn from the jury, and the Crown thereby having been relieved of the one real challenge to its proof, the appellant is entitled to a new trial.

I. Facts

7 I do not propose to repeat Justice Bastarache's summary of the facts except where necessary to explain our divergence in the result.

8 The prelude to the knife attack was a day-long drive from the Okanagan Valley to Vancouver, during which, according to the appellant, his wife created an explosive situation by her aggressive verbal attacks. The appellant had planned to take his sons out to dinner and a movie, but abandoned these plans because of his wife's objection. The appellant instead visited briefly with his sons. His wife waited in the truck. According to the appellant, his wife accelerated her attack on him upon his return to the driver's seat. She taunted him that his former wife had been "fucking all my friends" (while the two had been married) and that "my sons weren't my kids at all". As the verbal abuse continued, he said, "I can see she's losing it", so he pulled into a vacant lot and "she's still yelling at me that I'm nothing but a piece of shit". His wife then allegedly said she had told the police that he had been abusing her and that they were about to arrest him, and threatened to get a court order to force him out of their home leaving her in the house, collecting alimony and child support. He says she told him that she felt sick every time he touched her, that he was a "lousy fuck" with a small penis, and that she would never have sex with him again. As stated, a psychological report filed by the defence at trial characterized the comments attributed to Mrs. Stone as "exceptionally cruel, psychologically sadistic, and profoundly rejecting".

9 The appellant finally pulled off the highway in Burnaby to a vacant lot and described sitting in the truck with his head down, listening to his wife, and thinking that he and his boys did not deserve to be treated this way and "it's just kind of fading away". From there, he said, he remembered only a" whooshing" sensation washing over him, from his feet to his head. According to his account, when subsequently his eyes focussed, he was staring straight ahead and felt something in his hand. He looked down and saw his wife slumped over on the seat. He was holding the hunting knife that he kept stored in the truck. His wife was dead, having been stabbed 47 times. The appellant says that, at that time, he had no memory of stabbing his wife.

10 After 10 or 15 minutes, the appellant put his wife's body in a toolbox in the back of the truck and returned home. The next day, he sold some assets, settled some debts, and flew to Mexico. At trial the appellant recounted that one morning (while in Mexico), he awoke with the sensation of having his throat cut. In trying to recall what he had been dreaming about, the appellant remembered his wife's being stabbed in the chest. While the appellant maintained in his evidence-in-chief that he did not remember picking up the knife or taking it from its sheath, he did admit in cross-examination, when confronted with prior statements attributed to him in the psychiatrist's report, to a vague recollection through the dream of stabbing his wife twice in the chest before the" whooshing" sensation. His psychiatrist, Dr. Paul Janke, testified that the appellant had told him that, while in Mexico, he "became aware of a memory of having a knife in his hand and stabbing Donna Stone twice in the chest *before* having the 'whooshing' sensation ... whenever we talked about the stabbing, it would be in the context of stabbing twice and, and then having the whooshing experience" (emphasis added). One of Dr. Janke's tasks was to separate out the effects of amnesia after the event from the alleged unconsciousness during the events themselves, for as noted by Lord Denning in *Bratty v. Attorney-General for Northern Ireland* (1961), [1963] A.C. 386 (U.K. H.L.), at p. 409: "Loss of memory afterwards is never a defence in itself, so long as he was conscious at the time".

11 Roughly six weeks after the stabbing, the appellant returned to Canada and surrendered to police.

12 At trial, Dr. Janke testified for the defence that, at the time of the stabbing, the appellant was in a dissociative state caused by "extreme" psychological blows:

> Q But the comments that you reviewed and that are in evidence between Mrs. Stone and Mr. Stone aren't such, are they, of such an extraordinary nature that they might reasonably be presumed to affect the ordinary person?
>
> A We -- I would be astonished if somebody told me that being, being informed that they were about to lose their home and all their possessions; that their, what they thought were their children by a former wife were actually the product of affairs that the wife was having; and ultimately being told that you had a small penis and were poor in bed, most men would find that an extraordinary blow. If somebody told me they weren't upset by that, I would be concerned about it.
>
> Q No question —
>
> A Those are extreme --
>
> Q -- that he was upset.
>
> A No, those are extreme blows.

13 The defence was confronted with the decision of this Court in *R. v. Rabey*, [1980] 2 S.C.R. 513 (S.C.C.), which was said to hold that unless a state of automatism can be attributed on the evidence to some cause external to the mind of the accused, it must be related to a plea of insanity.

14 The appellant tried to run simultaneously both the non-insane and insane branches of the automatism plea, as well as provocation. He suggested, based on an *obiter dictum* in *Rabey* , *supra*, that the "psychological shock" inflicted on him was of so great a magnitude that it would have unhinged the ordinary person, thus qualifying as "externally" induced automatism which had nothing to do with a disease of the mind in any organic or other medical sense. He submitted in the alternative that if, contrary to the psychiatric evidence, the courts were to insist on characterizing his condition as a disease of the mind, then a finding of NCRMD would be consistent with Dr. Janke's evidence that the unconscious nature of his conduct excluded an" appreciation" of the consequences.

II. Judgments

A. The Supreme Court of British Columbia

(1) The Evidential Ruling in the Appellant's Favour

15 Brenner J. reasoned that the "defence" of automatism is only available where there is evidence of unconsciousness throughout the entire commission of a crime. While recognizing that there was some evidence before the court to the effect that the appellant recalled stabbing his wife twice in the chest, Brenner J. ultimately held that an accused's having some recollection of what has occurred does not preclude the availability of the defence. That decided, he held, seemingly based on the entirety of the defence testimony, that there was evidence of unconsciousness throughout the commission of the offence and the accused had successfully laid a foundation for the plea of automatism. The relevant portion of his ruling is as follows:

> In this case, it is my view that there is evidence of unconsciousness throughout the commission of the crime. The only evidence of recall is the recollection that came to the accused following a dream after he had gone to Mexico some days after the event.

> That being the case, it seems to me that the defence has met the threshold test pursuant to which I must at least consider whether the defence of automatism of either the insane or non-insane variety should be left to the jury. [Emphasis added.]

(2) The Withdrawal of the Issue of Non-insane Automatism from the Jury

16 Brenner J. considered that, in the absence of evidence to the contrary, the cause of the automatism (if it existed) must have been "internal" to the appellant's brain. On this basis, he concluded that he was bound by *R. v. MacLeod* (1980), 52 C.C.C. (2d) 193 (B.C. C.A.), to withhold the defence of "non-insane automatism" from the jury. In *MacLeod* the British Columbia Court of Appeal had applied the *Rabey* analysis to an accused who claimed to have "dissociated" owing to an accumulation of stresses in his family life and, while dissociated, to have sexually assaulted a five-year-old child who suffered from cerebral palsy. The British Columbia Court of Appeal in *MacLeod* held that the accused was either insane or should be held criminally responsible for his actions notwithstanding the alleged automatism.

(3) The Jury Charge

17 Brenner J. referred the jury to the specific pieces of evidence particularly relevant to consideration of the automatism defence. In the course of this process, he highlighted the evidence of dissociation:

> Dr. Janke, the forensic psychiatrist who testified for the defence, expressed the opinion that the accused was in a dissociative state when he killed his wife, and Dr. Murphy, the Crown forensic psychiatrist, expressed the opinion that the likelihood of the accused being in a dissociative state was very low.
>
> You will recall that Dr. Janke explained to you what dissociation was. He explained the phenomenon as a situation where an individual's thinking component and his judgment is separated from his body and his actions. He explained to you it was typically associated with some loss of memory, and I took from his evidence that the degree of memory loss will often or frequently depend on how deep the dissociative state.
>
> . . . . .
>
> He says, in his opinion, at the time the accused killed his wife, he did not have control over his actions, and a person in the accused's state, in Dr. Janke's opinion, would not appreciate the nature and quality of his act. [Emphasis added.]

18 Brenner J. concluded his instruction on this point by explaining the series of questions the jury should address:

> If you are satisfied on a balance of probabilities that the evidence establishes that the accused was suffering from a disease of the mind, you must then determine whether the disease of the mind rendered him either incapable of appreciating the nature and quality of the act he was doing or incapable of knowing that the act was wrong.

We do not know, of course, on which aspects of these multi-faceted questions the accused failed to satisfy the jury. We only know that at the conclusion of their deliberations the following exchange took place:

> MR. REGISTRAR: Members of the jury, have you reached a verdict?

MR. FOREMAN: We have, my lord.

The Court: Mr. Foreman, do you find the accused criminally responsible or not criminally responsible by reason of mental disorder?

THE FOREMAN: We find that the defendant is criminally responsible.

The Court: Proceed with the next question, Madam Registrar.

MR. REGISTRAR: Do you find the accused guilty or not guilty of second degree murder.

THE FOREMAN: Not guilty.

The Court: Thank you, Mr. Foreman.

Based on that verdict, I will direct that a verdict of guilty of the offence of manslaughter be entered....

The jury was *not* told that if they concluded that the accused was not suffering from a disease of the mind they could nevertheless decide that the appellant's actions were not voluntary and that such a finding, if made, would necessitate an acquittal. The jury was told, in effect, that notwithstanding the trial judge's ruling that there was evidence of "unconsciousness throughout the commission of the crime", the minimum verdict was manslaughter.

(4) Compelled Disclosure of the Expert Report to Crown

19 At the conclusion of the defence opening address, the Crown asked that the trial judge order that the defence provide them with a copy of Dr. Janke's report. Defence counsel objected that he had no obligation to disclose the report until Dr. Janke was called to the witness stand.

20 Brenner J. ordered that the report be produced stating that "the Crown ought to be in a position of being able to explore on cross-examination with the accused whatever statements Dr. Janke may or may not have relied upon in his report...."

B. British Columbia Court of Appeal (1997), 86 B.C.A.C. 169 (B.C. C.A.)

(1) The Automatism Issue

21 McEachern C.J. began by noting at p. 173 that, when considering whether to put a possible defence to a jury, a trial judge must determine whether there is sufficient evidence to lend an "air of reality" to the defence. He held that the trial judge had found that there was an "air of reality" to the appellant's assertion of automatism, but that this conclusion related to the concept in general, and not to a specific form of automatism.

22 Despite somewhat inconsistent evidence, both the trial court and the Court of Appeal held that there was evidence of dissociation throughout the length of the appellant's attack on his wife.

23 Referring to *Rabey*, *supra*, McEachern C.J. reasoned at p. 173 that the trial judge next had to determine if there was any evidence "from which the jury could reasonably conclude that the dissociated state was *not* caused by a disease of the mind" (emphasis added). In the absence of such evidence, he held that a dissociated state could only result from a disease of the mind.

24 McEachern C.J. noted by a process of elimination that the only potential explanation for Stone's behaviour was the impact of his wife's abuse. He considered that such psychological blows are usually insufficient to cause" non-insane automatism". This led to the conclusion that the violent reaction to psychological trauma should be attributed primarily to the individual's internal psychological or emotional weaknesses. He held that Brenner J. had properly applied the *Rabey* test in concluding that the cause of the appellant's dissociative state, if such had occurred, was primarily related to his reaction to verbal abuse "which is more properly characterized as an *internal* as opposed to an *external* cause, and is, accordingly, a disease of the mind." As such, he held that the trial judge had properly refused to put "sane automatism" to the jury.

25 McEachern C.J. noted that this Court's decision in *R. v. Parks*, [1992] 2 S.C.R. 871 (S.C.C.) (the sleepwalker case), may justify using something other than an internal/external cause approach to identify a "disease of the mind". He referred specifically to a passage from the majority judgment of La Forest J. which said that the distinction drawn in *Rabey* between internal and external causes is meant only as an analytical tool, and not as an all-encompassing methodology.

26 Despite this, McEachern C.J. preferred the *Rabey* approach. He thought, at p. 176, that the present case was one where," but for some ill-defined, but readily understood internal component of a person's psychological state, the ordinary processes of a conscious mind would normally prevent such a violent reaction to criticism and insults." Viewing the problem as one of an exceptional frailty of mind, McEachern C.J. held that the trial judge was correct not to charge the jury on "non-insane automatism".

(2) Compelled Disclosure of the Expert Report to Crown

27 McEachern C.J. recognized that, while the disclosure had permitted an orderly cross-examination of the appellant who was, inevitably, the only factual source for the psychiatric opinions, the trial judge should not have ordered the production of Dr. Janke's report prior to his being called as a witness. In this respect he relied upon a long line of cases, including *R. c. Brouillette*, 78 C.C.C. (3d) 350, [1992] R.J.Q. 2776 (Que. C.A.), and *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 (B.C. C.A.), which confirmed that an expert report obtained for the assistance of counsel is privileged unless and until the accused takes the stand.

28 That said, McEachern C.J. preserved the conviction by relying on s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. He held that no miscarriage of justice occurred as a result of the premature disclosure. Counsel for the accused had made a commitment in his opening address to the jury to call Dr. Janke. Disclosure would have been required once Dr. Janke had begun to testify because any privilege attaching to it would have been waived by the defence putting him on the stand. Absent timely disclosure, the Crown would have had the option of standing the accused down and resuming his cross-examination after Dr. Janke had testified and the report had been disclosed. Accordingly, the end result would have been the same.

III. Analysis

A. The Automatism Issue

29 This appeal raises questions about the allocation of issues between the judge and jury in the difficult area of automatism. Part of the difficulty stems from the concern of some judges that juries may be too quick to accept the story of an accused that he or she doesn't remember what happened, or that the conduct was "uncontrollable", or some other feigned version of events. In *R. v. Szymusiak*, [1972] 3 O.R. 602 (Ont. C.A.), at p. 608, Schroeder J.A. observed that automatism is:

> ... a defence which in a true and proper case may be the only one open to an honest man, but it may just as readily be the last refuge of a scoundrel. It is for these reasons that a Judge presiding at a trial has the responsibility cast upon him of separating the wheat from the chaff.

One might also cite to the same effect the scoffing tone of G. Williams in his *Textbook of Criminal Law* (2nd ed. 1983), at pp. 673-74:

> ...where a person who is fully awake flees from the police, or attacks another in jealousy or anger, a defence of dissociation is hard to credit, however many experts are called to give evidence in support of it. How strange, the layman may say, and how very convenient for the defendant, that this alleged state of dissociation descended on him at the very moment when he had reason for evading the police, or when he was face to face with a person whom he had a strong motive for attacking. The more down-to-earth explanation of the defendant's "narrowing of the field of consciousness" is that it resulted merely from an overwhelming passion which led him to pay no attention to ordinary moral or prudential considerations; this is not inconsistent with the supposition that he was perfectly aware of what he was doing, psychiatric evidence to the contrary notwithstanding.

In giving heed to these wise words of scepticism, the courts must nevertheless respect the allocation by Parliament to the jury the tasks of assessing credibility and the making of findings of fact. A concern that the jury may fall into error is no basis for taking away part of its jurisdiction. The central feature of this appeal is the finding of the trial judge, accepted by the British Columbia Court of Appeal, that there was "evidence of unconsciousness throughout the commission of the crime". The appellant says he was entitled to have his case dealt with by the jury on that basis.

(1) The Evidentiary Ruling

30 The trial judge properly instructed himself with respect to the evidential onus. He applied the test set out by Dickson J., as he then was, in *Rabey*, *supra*, at p. 552:

> In principle, the defence of automatism should be available whenever there is evidence of unconsciousness throughout the commission of the crime, that cannot be attributed to fault or negligence of his part. Such evidence should be supported by expert medical opinion that the accused did not feign memory loss and that there is no underlying pathological condition which points to a disease requiring detention and treatment.

Although given in dissent, Dickson J.'s statement of the evidential burden was subsequently adopted and applied by the majority of this Court in *Parks*, *supra*.

31 The trial judge properly applied the test. There is no suggestion that the appellant's alleged state of unconsciousness, if it existed, came about through his own fault or negligence. The appellant's evidence that he was unconscious" throughout the commission of the crime" was supported by the expert medical opinion of Dr. Janke, who said it was a "necessary component" of doing his forensic assessment to determine whether the appellant was "fabricating". Dr. Janke went further than merely reporting what the appellant had said to him. Dr. Janke's professional opinion was that the appellant was not fabricating his story, that the allegation of unconsciousness was corroborated to some extent by the appellant's psychological make-up, and that it would be very difficult (albeit not impossible) for the appellant to present a story of dissociation" in a sophisticated way that would fool an experienced forensic psychiatrist". Dr. Janke testified that the appellant suffered from no underlying pathological condition which pointed to a disease requiring detention and treatment.

32 The evidence on unconsciousness was somewhat equivocal, in my review of it, but I did not have the advantage of seeing and hearing the appellant or Dr. Janke, and I am not in any position to impeach the conclusion of the trial judge that:

> In this case, it is my view that there is evidence of unconsciousness throughout the commission of the crime. The only evidence of recall is the recollection that came to the accused following a dream after he had gone to Mexico some days after the event.
>
> That being the case, it seems to me that the defence has met the threshold test.... [Emphasis added.]

I agree with Bastarache J. in para. 192 of his reasons that it would be preferable to have additional corroborative evidence, such as bystanders to the event or a documented history of automatistic-like dissociative states. However, the absence of such corroboration cannot relieve the court of the duty to consider the defence that is in fact presented, warts and all. Under our system, once the evidential burden is met, the assessment of the credibility of the defence is up to the jury.

(2) Proof of the Offence

33 In *Parks*, *supra*, a majority of this Court observed that" voluntariness" can be seen as part of the *actus reus* requirement of criminal liability, *per* La Forest J., at p. 896:

> Automatism occupies a unique place in our criminal law system. Although spoken of as a "defence", it is conceptually a sub-set of the voluntariness requirement, which in turn is part of the *actus reus* component of criminal liability. [Emphasis added.]

34 The same point was made by Lamer C.J. and La Forest J. in *R. c. Daviault*, [1994] 3 S.C.R. 63 (S.C.C.). See also McLachlin J. in *R. v. Théroux*, [1993] 2 S.C.R. 5 (S.C.C.) (cited by Cory J. in *Daviault*, at p. 74), who observed, at p. 17:

> The term *mens rea*, properly understood, does not encompass all of the mental elements of a crime. The *actus reus* has its own mental element; the act must be the voluntary act of the accused for the *actus reus* to exist. *Mens rea*, on the other hand, refers to the guilty mind, the wrongful intention, of the accused. Its function in criminal law is to prevent the conviction of the morally innocent — those who do not understand or intend the consequences of their acts. Typically, *mens rea* is concerned with the consequences of the prohibited *actus reus*. [Emphasis added.]

35 Cory J. in *Daviault*, at pp. 75 and 102, pointed out that automatism may also relate in some circumstances to *mens rea*. See also *R. v. Chaulk*, [1990] 3 S.C.R. 1303 (S.C.C.). For the purposes of this appeal, however, it is sufficient to note that a claim of automatism puts in issue the Crown's ability to prove all of the elements of the offence beyond a reasonable doubt.

(3) Relieving the Crown of Part of its Persuasive Burden of Proof

36 The Crown supports the ruling of the courts in British Columbia on a number of grounds:

(a) the presumption of voluntariness;

(b) the decision of this Court in *Rabey*, *supra*;

(c) the contention that the mental disorder provisions of the *Criminal Code* were appropriate to resolve the automatism issue on the facts of this case.

I will address each of these Crown arguments in turn.

(a) Ground 1: The Presumption of Voluntariness

37 The criminal law is premised on the responsibility of sane individuals for their voluntary acts or omissions. We infer from common experience that the acts of an apparently conscious person are usually voluntary. The issue here, however, is whether such an inference of voluntariness can be drawn after the trial judge has ruled that there is credible evidence that the accused was *unconscious* throughout the commission of the offence.

38 Everyday experience for most of us does not teach whether the acts of a person in a severely impaired state of consciousness, such as sleepwalking or an epileptic fit, are voluntary. Dickson J., dissenting, stated in *Rabey*, *supra*, at p. 545, "Consciousness is a *sine qua non* to criminal liability".

(i) Relationship between Voluntariness and Consciousness

39 The concepts of unconsciousness and involuntariness are linked in the definition of automatism proposed by the Ontario High Court of Justice in *R. v. K.* (1970), 3 C.C.C. (2d) 84 (Ont. H.C.), at p. 84, and adopted by a majority in this Court in *Rabey*, *supra*, at p. 518:

> Automatism is a term used to describe unconscious, involuntary behaviour, the state of a person who, though capable of action is not conscious of what he is doing. It means an unconscious involuntary act where the mind does not go with what is being done. [Emphasis added.]

The relationship between voluntariness and consciousness was also addressed by Mason C.J., Brennan and McHugh JJ. in *R. v. Falconer* (1990), 50 A. Crim. R. 244 (Australia H.C.), at p. 250:

> Although the prosecution bears the ultimate onus of proving beyond reasonable doubt that an act which is an element of an offence charged was a willed act or, at common law, was done voluntarily..., the prosecution may rely on the inference that an act done by an apparently conscious actor is willed or voluntary to discharge that onus unless there are grounds for believing that the accused was unable to control that act. [Emphasis added.]

Just as the High Court was prepared to infer voluntariness from consciousness, evidence of lack of consciousness may support a claim of automatism (i.e., that there was a lack of voluntariness). The question is, What is meant in this context by "lack of consciousness"? In the present case, the Crown psychiatrist contended that in medical terms the appellant could not be considered unconscious:

> A I'm not sure what unconscious means in the legal sense, but --
>
> Q In the medical sense.
>
> A In the medical sense, he wasn't unconscious. Unconscious means flat out on the floor. He clearly wasn't, from all the information that we have, unconscious in that sense.

40 From the legal perspective, "unconsciousness" is used in the sense that the accused, like the sleepwalker,

is shown "not to have known what he was doing". (See *Parks*, *supra*, at p. 871, and *R. v. Tolson* (1889), 23 Q.B.D. 168 (Eng. Q.B.), at p. 187.) This excludes the person who is provoked and says," I couldn't help myself", or who simply professes to be at a loss to explain uncharacteristic conduct: see generally Lord Denning in *Bratty* , *supra*, at p. 409, who there defined automatism as:

> ...an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking. [Emphasis added.]

Voluntary action presupposes a measure of conscious control. Dickson J. in *Rabey* allowed, at p. 550, that, "[a]t common law a person who engaged in what would otherwise have been criminal conduct was not guilty of a crime if he did so in a state of unconsciousness or *semi-consciousness*" (emphasis added). In context, however, the reference to" semi-consciousness" was to a state of diminished awareness that *negated* control. I think Crown counsel's submissions in oral argument were consistent with this approach. He submitted that automatism describes" involuntary behaviour that occurs without the minimum mental element necessary to *will* the act", and "[i]t is the state of a person who, though capable of action, is *incapable* of knowing that the act is taking place" (emphasis added). His definitions encompassed the notions of awareness *and* control. I agree with the Crown's submissions in this regard. Dr. Janke, the defence psychiatrist, used "consciousness" in the sense of awareness or control, as is clear from the following extracts from his evidence:

> [A person] can, as in Mr. Stone's case, have a fragment of memory and, fragmentary memory even before the attack, the actual attack on Donna Stone, and not be in a, not have any control over what they are actually doing. [Emphasis added.]
>
> . . . . .
>
> Based on Mr. Stone's descriptions of the events and my understanding of the circumstances from the other materials, it would be my opinion that he did not have control over his actions. [Emphasis added.]

At the same time, the evidence that the appellant recalled some weeks after the killing "stabbing twice and, *then* having the whooshing experience" raised an important problem for the trial judge. If it were contended that the appellant suffered a" black-out" of consciousness, and was incapable of exercising any conscious control over his actions, voluntariness would be put in issue. The appellant would have identified an explanation for his lack of control, namely that he was unconscious at the time. If, however, the appellant was conscious, even for only the initial stab wounds, he would be confronted with the presumption of voluntariness for that period of time. The trial judge dealt with this issue as follows:

> During the submissions by counsel, I indicated that my review of the authorities suggested that the defence of automatism was only available in the event that there is evidence of unconsciousness throughout the entire commission of a crime. That is the language used by Chief Justice Dickson. In this case, there is some evidence that the accused was aware and was not unconscious throughout the commission of the crime. He was able to testify before the court that he recalled stabbing his wife twice in the chest. The question at issue at this stage is whether that evidence takes this case out of the realm of automatism as a matter of law.
>
> . . . . .
>
> On my reading of the authorities, I conclude that the authorities do not exclude the possibility of the defence

> of automatism being available because an accused is able to have some recollection of what occurred.
>
> In this case, it is my view that there is evidence of unconsciousness throughout the commission of the crime. The only evidence of recall is the recollection that came to the accused following a dream after he had gone to Mexico some days after the event.
>
> That being the case, it seems to me that the defence has met the threshold test....

The trial judge thus found, at the conclusion of a careful analysis, that a properly instructed jury, acting reasonably, could find that the appellant was unconscious "throughout the commission of the crime". He found the evidence was capable (if believed) of satisfying the definition of automatism given by Dickson J. in *Rabey*. In these circumstances, "the defence of automatism should be available" (*Rabey* Dickson J., at p. 552). This initial ruling was not disturbed by the British Columbia Court of Appeal. This Court is thus confronted with concurrent findings on this crucial point. The remaining issue is whether there was any legal justification for depriving the appellant of the benefit of that evidentiary ruling, and taking the issue of automatism away from the jury.

(ii) Provocation and Automatism

41 The appellant relied on both automatism and provocation. It is important to differentiate these concepts. Automatism is not a medically repackaged and enhanced variant of the provocation defence, although provocation is sometimes put forward as a fallback position in the event automatism is rejected. As stated, a plea of automatism puts in issue the Crown's ability to prove its case. Provocation, under s. 232 of the *Code*, operates to reduce to manslaughter an *established* case of "[c]ulpable homicide that otherwise would be murder". The two concepts are quite distinct and their application depends on the nature of the impact on an accused of the triggering event.

42 In *R. v. Parnerkar* (1973), [1974] S.C.R. 449 (S.C.C.), the accused, who was born in India, killed the woman he wanted to marry by stabbing her with a knife. The accused had travelled from Toronto to Regina to see the victim, a divorced mother of Hungarian origin, with whom he had had an on-again off-again romantic attachment for about seven years. From the victim's point of view, the romance had cooled. She wanted the accused out of her house and out of her life. Her son testified that prior to the stabbing his mother had said," I am not going to marry you because you are a black man", although the accused denied hearing this remark. Two or three of the victim's letters were produced by the accused to the victim's children. The victim tore up an envelope, symbolically ending the relationship. Events exploded. The victim was stabbed. This Court, in a divided decision, held that the defence of insane automatism had properly been left with the jury (which rejected it) and that the precipitating conduct did not amount to provocation because it did not constitute a "wrongful act or insult" within the meaning of the *Code*. The Court did not allow the jury to consider the plea of non-insane automatism. *Parnerkar* was a precursor to *Rabey* in this respect.

43 There would clearly be a concern about the prospect of conduct insufficient to ground provocation nevertheless being permitted to support non-insane automatism (or, to use the current term, non-mental disorder automatism), which, of course, may lead to an outright acquittal rather than a reduction from murder to manslaughter. The key distinction between the two concepts is that automatism relates to a lack of voluntariness in the accused, an essential element of the offence, while provocation is a recognition that an accused who "voluntarily" committed all the elements of murder may nevertheless have been provoked by a wrongful act or insult that would have been sufficient, on an objective basis, to deprive an ordinary person of the power of self-control. Thus, a constitutional challenge to the "objective" elements of the provocation defence failed, correctly

in my view, in *R. v. Cameron* (1992), 71 C.C.C. (3d) 272 (Ont. C.A.), on the grounds that provocation did not arise for consideration until *after* the Crown had successfully established all of the "subjective" elements of unlawful homicide beyond a reasonable doubt. The provocation defence did not relieve the Crown of any element of its proof. Provocation simply operates, where applicable, to reduce murder to manslaughter. Thus, while evidence relating to the events preceding the commission of an offence may raise questions about both automatism and provocation, very different proof of facts must be made before either one of these issues can be left with the jury.

(iii) Onus of Proof

44 My colleague Bastarache J. proposes, at para. 179, that the Court take this opportunity to add to the evidential burden on the accused a second and more onerous obstacle, namely the persuasive or legal burden on the accused to establish automatism on a balance of probabilities. The onus issue does not truly arise on the facts of the appeal. The issue of non-mental disorder automatism was not put to the jury at all, and it is superfluous to consider what *ought* to have been said about onus had the trial judge done what he didn't do and, as the appeal is to be dismissed, he will never have to do in this case.

45 More importantly, piling the persuasive burden on top of the evidential burden represents a change in the law as settled by this Court in *Parks*, *supra*, only seven years ago. In his majority judgment in *Parks*, La Forest J. reproduced with approval, at p. 897, a portion of Dickson J.'s earlier dissent in *Rabey*. In that passage, Dickson J. was careful to emphasize that imposition of an *evidential* burden as a matter of policy to filter out frivolous claims did not in any way indicate that an accused carried any part of the *persuasive* or legal burden, whether on a balance of probabilities or otherwise. See *Rabey*, at p. 545:

> The prosecution must prove every element of the crime charged. One such element is the state of mind of the accused, in the sense that the act was voluntary. The circumstances are normally such as to permit a presumption of volition and mental capacity. That is not so when the accused, as here, has placed before the court, by cross-examination of Crown witnesses or by evidence called on his own behalf, or both, evidence sufficient to raise an issue that he was unconscious of his actions at the time of the alleged offence. No burden of proof is imposed upon an accused raising such defence beyond pointing to facts which indicate the existence of such a condition.... [Emphasis added.]

La Forest J. in *Parks*, *supra*, added the following explanation at p. 897:

> ...[the judge] must determine whether there is some evidence on the record to support leaving the defence with the jury. This is sometimes referred to as laying the proper foundation for the defence; see *Bratty, supra*, at pp. 405 and 413. Thus an evidential burden rests with the accused, and the mere assertion of the defence will not suffice; see *Bratty*, at p. 414. [Emphasis added.]

46 The concept of an evidential burden is "a product of the jury system", *per* J. Sopinka, S. Lederman and A. Bryant, *The Law of Evidence in Canada* (1992), at p. 61. The authors contrast the evidential burden with the legal or persuasive burden as follows, at p. 58:

> The significance of the evidential burden arises when there is a question as to which party has the right or the obligation to begin adducing evidence. It also arises when there is a question as to whether sufficient evidence has been adduced to raise an issue for determination by the trier of fact. The legal burden of proof normally arises after the evidence has been completed and the question is whether the trier of fact has been

> persuaded with respect to the issue or case to the civil or criminal standard of proof. The legal burden, however, ordinarily arises after a party has first satisfied an evidential burden in relation to that fact or issue.

It is no part of an "evidential burden" to require an accused to go on to satisfy the jury on a balance of probabilities or otherwise about the facts in issue — *per* Dickson C.J. in *R. v. Schwartz*, [1988] 2 S.C.R. 443 (S.C.C.), at p. 467:

> The party with an evidential burden is not required to convince the trier of fact of anything, only to point out evidence which suggests that certain facts existed.

47 In neither *Rabey* nor *Parks* was it suggested, much less decided, that the accused should shoulder any part of the persuasive or legal burden of proof. On the contrary, the *evidential* burden was put forward in both cases as a safeguard against putting the Crown too quickly or too lightly to the task of discharging the *persuasive* or legal burden of proof.

48 This allocation of responsibilities is not without its critics. The Minister of Justice, in her 1993 *Proposals to amend the Criminal Code* (*general principles*), suggested that the burden of proof in all cases of automatism be on a balance of probabilities by the party that raised the issue. Parliament has not seen fit to act on this recommendation. I do not believe, with respect, that the Court ought to take it upon itself to reverse the persuasive burden to the disadvantage of the accused simply because the Court may find an unenacted policy initiative more attractive than the established law. Parliament made a choice to impose a persuasive burden on a balance of probabilities in the case of mental disorder which includes mental disorder automatism. It did not do so in the case of non-mental disorder automatism. Any such imposition would require a justification under s. 1 of the *Charter*. On this appeal, however, neither the respondent nor any of the Attorneys General who intervened in the appeal (Canada, Ontario and Alberta) suggested that such a change of onus was either desirable or necessary.

49 In my view, the decisions of this Court in *Chaulk*, *supra*, and *Daviault*, *supra*, do not warrant a reversal of the persuasive burden. Such a reversal would create a potential for injustice where a jury is obliged to convict an accused who properly raised the issue of automatism even though the jury entertains a reasonable doubt about the voluntariness of the accused's conduct. In *Chaulk* the Court dealt with a statutory reverse onus in the context of insanity. Section 16(4) of the *Code* provided at the time that "Every one shall, until the contrary is proved, be presumed to be and to have been sane". The Court agreed that placing a burden of proof on the accused to persuade the jury of insanity on a balance of probabilities infringed the presumption of innocence guaranteed by s. 11(*d*) of the *Charter, per* Lamer C.J., at pp. 1330-31:

> Section 16(4) allows a factor which is essential for guilt to be presumed, rather than proven by the Crown beyond a reasonable doubt. Moreover, it requires an accused to disprove sanity (or prove insanity) on a balance of probabilities; it therefore violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused. [Emphasis in original.]

A majority of the Court saved the reverse onus under s. 1 based on evidence and submissions (p. 1337) of the "impossibly onerous burden of disproving insanity". There has been no equivalent showing under s. 1 in this case.

50 In *Daviault* , on the other hand, a majority of the Court recognized an exception to the existing common

law rule established in *R. v. Leary* (1977), [1978] 1 S.C.R. 29 (S.C.C.), that the *mens rea* of a general intent offence could *not* be negated by evidence of even extreme drunkenness. The Court was concerned that the common law rule violated the *Charter*. As Cory J. stated in *Daviault*, at p. 73:

> In my opinion, the principles embodied in our *Canadian Charter of Rights and Freedoms*, and more specifically in ss. 7 and 11(*d*), mandate a limited exception to, or some flexibility in, the application of the *Leary* rule. [Emphasis added.]

The price of the "limited exception to" the *Leary* rule was that the accused, who experienced the steps by which he got himself drunk, was required to show, on a balance of probability, that the drunkenness induced an absence of awareness that was akin to a state of insanity or automatism. At p. 101, Cory J. explained:

> This Court has recognized, in *R. v. Chaulk* ... that although it constituted a violation of the accused's rights under s. 11(*d*) of the *Charter*, such a burden could be justified under s. 1. In this case, I feel that the burden can be justified. Drunkenness of the extreme degree required in order for it to become relevant will only occur on rare occasions. It is only the accused who can give evidence as to the amount of alcohol consumed and its effect upon him.

The Court thus concluded that a s. 1 justification had been established. Drunkenness is a matter of degree. It is a reasonably common phenomenon in its lesser manifestations. In its extreme form it may produce a potential defence *akin* to automatism to which special rules apply. *Daviault* did not suggest a reversal of the persuasive burden whenever the state of mind of an accused is successfully put in issue, in provocation for example (s. 232, *R. v. Linney* (1977), [1978] 1 S.C.R. 646 (S.C.C.), *R. v. Thibert*, [1996] 1 S.C.R. 37 (S.C.C.)), or self-defence (s. 34, *R. v. Lavallee*, [1990] 1 S.C.R. 852 (S.C.C.), *R. v. M. (M.A.)*, [1998] 1 S.C.R. 123 (S.C.C.)), or an accused's belief as to consent to an assault (s. 265(4), *R. v. Latour* (1950), [1951] S.C.R. 19 (S.C.C.), *R. v. Osolin*, [1993] 4 S.C.R. 595 (S.C.C.), at pp. 682-83); in all such cases (and many others) the Crown carries the persuasive burden to negate a state of mind asserted by the accused, despite the fact that an accused is often in a better position than the Crown to shed light on his or her state of mind at the time of the alleged crime. The accused may be in a better position to shed light on most elements of the offence. The Crown did not ask for a reverse onus where non-insane automatism is in issue and therefore did not put forward a case for the application of s. 1. I do not believe the Court ought to embark on organizing its own s. 1 justification where none of the Attorneys General saw fit even to propose the shift of the persuasive onus much less to try to justify it.

51 Courts in most other jurisdictions, including the United Kingdom, the United States, Australia and New Zealand, impose only an evidential burden on an accused. The persuasive or legal burden remains on the Crown — the United Kingdom: see Bratty, *supra, per* Viscount Kilmuir L.C., at p. 406, *per* Lord Denning, at p. 413, and *per* Lord Morris of Borth-y-Gest, at p.416, and see *Halsbury's Laws of England* (4th ed. reissue 1990), vol. 11(1), at para. 6; the United States: see *State v. Hinkle*, 489 S.E.2d 257 (W.Va. 1996), and see W. LaFave and A. Scott, *Substantive Criminal Law* (1986), vol.1, at p. 545:

> Some authority is to be found to the effect that the defendant has the burden of proving the defense of automatism. The prevailing view, however, is that the defendant need only produce evidence raising a doubt as to his consciousness at the time of the alleged crime. If the defense really is concerned with whether the defendant engaged in a voluntary act, an essential element of the crime, then it would seem that the burden of proof must as a constitutional matter be on the prosecution.

See also Australia: *Falconer*, *supra*, at p. 250, and *Hawkins v. R.* (1994), 72 A. Crim. R. 288 (Australia H.C.), at

pp. 292-93; and New Zealand: *R. v. Cottle*, [1958] N.Z.L.R. 999, at pp. 1007-08, and *Police v. Bannin*, [1991] 2 N.Z.L.R. 237 (New Zealand H.C.), at p. 242.

52 This weight of criminal practice in comparable jurisdictions would make it awkward for an attorney general to argue that a reverse onus in this case is demonstrably justified "in a free and democratic society" within the meaning of s. 1 of the *Charter*, but, as stated, none of the Attorneys General who appeared before us even attempted to make this argument.

53 I am not persuaded, in any event, that the onus of proof would be decisive on the facts of this case. There were only two witnesses supporting automatism, the accused and his medical expert. If they were disbelieved, the Crown would have had no difficulty discharging its persuasive onus. If they were believed, on the other hand, switching the persuasive onus to the defence would not have saved the prosecution from defeat.

(b) Ground 2: The Decision of this Court in Rabey, supra

54 The Crown's second principal submission is that even if it were to be found that the conduct of the appellant was involuntary, a majority of this Court in *Rabey* , *supra*, held that automatism which cannot be attributed to any external cause, such as a blow on the head, should be characterized as a disease of the mind. The Crown says that an "ordinary person" could be assumed to have the capacity to shoulder such a "psychological blow" as was here inflicted on the appellant by his wife without dissociating. The cause of the appellant's "dissociation", if such it was, should therefore be attributed to a disease of the mind. The *Rabey* classification scheme, it was acknowledged, is not borrowed from medical science, but the Crown says it can be justified on the notion that" disease of the mind" is a legal not a medical concept. The result, says the Crown, is that, as the jury refused to accept the NCRMD plea, it was properly required to convict the accused without considering evidence (which the Court has found to be reasonably capable of belief) that the conduct was involuntary.

55 While I have been using, to this point, the traditional terms "insane" and "non-insane" automatism, it is more convenient from this point onwards to refer to "mental disorder" automatism and "non-mental disorder" automatism. This is because the amendments to s. 16 of the *Code* made in 1991 (S.C. 1991, c. 43) removed all references to the term "insanity" from the *Code* and the common law terms should be correspondingly up-dated to minimize confusion.

56 It is important to make careful note of the facts in *Rabey* , *supra*. The accused was an "emotionally immature" male student at the University of Toronto, who had become smitten by an attractive outgoing female student. She did not reciprocate his affections. In fact, she wrote a rather contemptuous and demeaning note about him to a friend. The note was never intended for the eyes of the accused, but it fell into his possession and he was devastated by what he read. The accused and the woman subsequently found themselves alone in a university building, at which point the accused, suffering what he said was a "psychological blackout", brutally beat the woman whom he said he loved more than anyone else he had ever met. Expert evidence called by the defence at trial supported the theory of a" blackout" induced by a psychological blow without any accompanying" disease of the mind". The trial judge put the issue of non-mental disorder automatism to the jury, who acquitted. The Ontario Court of Appeal reversed that decision ((1977), 17 O.R. (2d) 1 (Ont. C.A.)). Martin J.A. comprehensively reviewed the precedents and concluded, at p. 22, that the student had merely suffered one of" the ordinary stresses and disappointments of life which are the common lot of mankind" and was not entitled to the benefit of non-mental disorder automatism. Martin J.A. considered that the so-called "blow" would not have caused an ordinary person to black out. If it blacked out the accused, he must have been suffering from some

mental frailty which the law would regard as a disease of the mind. In the absence of a disease of the mind, Martin J.A. seemed to feel, the evidence of a "blackout" from such a minor rebuff was simply not credible. Martin J.A. was clearly perturbed that the jury had acquitted on such evidence. The Court of Appeal set aside the acquittal and ordered a new trial at which the accused would be allowed to run only an insanity defence. The decision and the reasoning of Martin J.A. were adopted by a majority of this Court.

57 Critical to the analysis of Martin J.A. was the concept that a "psychological blackout" could be attributed to one of three sources: (1) an external cause such as a blow to the head in which case an accused would be entitled to raise non-mental disorder automatism, (2) an internal cause that would be likely to produce a similar psychological impact on a person of everyday sensibilities and psychological make-up, such as a person's witnessing the killing of his or her own children, which could qualify as an "external" cause and which might (the point was left open) entitle an accused to plead non-mental disorder automatism, or (3) an internal cause which was triggered by no more than "the ordinary stresses and disappointments of life". In the absence of any other credible explanation, the cause of the automatism in the third scenario would be deemed to be a "disease of the mind". It was held in *Rabey* that the accused fell into this third scenario since Martin J.A. concluded that an ordinary person would not have become dissociated in such a situation. Therefore, under the three-part model, the only automatism defence open to Rabey was *mental disorder* automatism. A relevant consideration was the sense that "[e]xternal influences on the accused are perceived as less likely than internal ones to present a danger in the future" (I. Grant, D. Chunn and C. Boyle, *The Law of Homicide* (1994, loose-leaf), p. 6-118).

58 Martin J.A. was clearly unimpressed with the idea that a university student's unrequited love could sustain the theory of a psychological blow causing dissociation leading to a violent assault. Rabey, he thought, was either suffering from a disease of the mind or his description of events was to be disbelieved.

(i) The Concept of Disease of the Mind

59 The *Rabey* analysis puts the concept of "disease of the mind" at the centre of the automatism analysis. By expanding the definition of "disease of the mind", the courts have expanded the role of NCRMD, and contracted the area of human conduct that potentially leads to an outright acquittal on the basis of the Crown's failure to prove the *actus reus* of the offence. Given this crucial control function, it is not surprising that the courts have insisted that the definition of "disease of the mind" must be a matter of law, and is not to be dictated by medical experts.

60 Medical input, of course, is nevertheless an essential component. As La Forest J. stated in *Parks*, *supra*, at p. 898, quoting Martin J.A. in *Rabey*, *supra*, at p. 12:

> "Disease of the mind" is a legal term, not a medical term of art; although a legal concept, it contains a substantial medical component as well as a legal or policy component.

Martin J.A. described the "policy function" in *Rabey*, at p. 12, as relating to:

> ...(a) the scope of the exemption from criminal responsibility to be afforded by mental disorder or disturbance, and (b) the protection of the public by the control and treatment of persons who have caused serious harms while in a mentally disordered or disturbed state.

Having regard to the policy component, Martin J.A., at p. 14 went on to demonstrate that the *legal* concept of "disease" of the mind includes disorders which have no organic or physical cause, and includes "purely function-

al disorders which, so far as is known, have no physical cause", and may be "permanent or temporary, curable or incurable ... [or] recurring or non-recurring". In this case the medical experts differed over whether the appellant had conscious control over his actions at the time of the killing, but they were unanimous that the appellant did not suffer from any condition that medicine would recognize as a "disease of the mind".

(ii) This Court's Subsequent Decision in Parks

61 This Court's decision in *Rabey* must now be read in light of the subsequent attempt to apply its analytical framework to the case of a sleepwalker in *Parks*. La Forest J. in *Parks* appeared to accept many of the policy considerations that preoccupied the Court in *Rabey* while rejecting any mechanical application of the *Rabey* criteria for classifying cases into what we would now call mental disorder automatism or non-mental disorder automatism.

62 In *Parks*, the accused, in a state of somnambulism, killed his mother-in-law and severely assaulted his father-in-law. The jury accepted the expert evidence that the conduct of the accused, while asleep, was involuntary. The Crown appealed the acquittal to the Ontario Court of Appeal, which affirmed the verdict, and again to this Court, which unanimously dismissed the appeal.

63 The Crown took the position in *Parks*, based on its analysis of *Rabey*, that somnambulism is an "internal" cause of automatism, and the accused sleepwalker would therefore have to prove on a balance of probabilities that he was NCRMD. In the course of rejecting this submission, La Forest J. in *Parks* identified two policy-driven considerations, namely the" continuing danger" and "internal cause" theories, at p. 901:

> The continuing danger theory holds that any condition likely to present a recurring danger to the public should be treated as insanity. The internal cause theory suggests that a condition stemming from the psychological or emotional make-up of the accused, rather than some external factor, should lead to a finding of insanity. The two theories share a common concern for recurrence, the latter holding that an internal weakness is more likely to lead to recurrent violence than automatism brought on by some intervening external cause.

64 Sleepwalking did not fit the *Rabey* analysis. While possibly associated with certain external stimuli, sleepwalking springs from the workings of the internal recesses of the brain, and would therefore have to be classified by proponents of the internal cause theory as a" disease of the brain". However, few people would equate sleepwalking with insanity. Martin J.A. sought to qualify his analysis by identifying sleepwalking as a "separate category" (at p. 17), but in *Parks*, La Forest J. saw sleepwalking as undermining the utility of the internal cause theory itself, which he therefore downgraded to an "analytical tool" (at p. 902).

65 I believe the Court was correct in *Parks* to dissociate itself from a mechanical application of the *Rabey* analysis. In the first place, an overly rigid application of the" internal cause" theory produces anomalous distinctions. In *R. v. Quick*, [1973] 3 All E.R. 347 (Eng. C.A.), the accused had assaulted his victim under the influence of an insulin injection, and Lawton J.A. utilized the notion of external cause (i.e., the injection) to *negate* the existence of a disease of the mind. On the other hand, in *R. v. Hennessy* (1989), 89 Cr. App. R. 10 (Eng. C.A.) it was held that the involuntary conduct of a diabetic who *failed* to take his insulin was internally caused (by his diabetes) and must thus be considered an expression of insanity. The differing treatment of diabetes, based on factors which have nothing to do with the underlying nature of the condition, demonstrates the potential artificiality of the analysis, and thus its limitations.

66 In the second place, the elastic notion of "mental disorder" can be expanded to the point where it ceases

to have any utility for classification. The elasticity of use is not confined to the legal profession. E. Tollefson and B. Starkman note in their *Mental Disorder in Criminal Proceedings* (1993), at p. 53, the view of the Canadian Psychiatric Association that *all* causes of automatism are mental disorders, as they see the world. From a legal perspective, however, classification of a problem as a "mental disorder" has to be given some substantive content, or s. 16 and Part XX.1 of the *Code* (and its tests descended from the M'Naghten Rules (*McNaughten's Case, Re* (1843), 10 Cl. & Fin. 200, (8 E.R. 718 (U.K. H.L.))) may be imposed inappropriately. As pointed out by Williams, *supra*, at p. 676:

> The courts should eschew any effort to discourage the defence of dissociation by interpreting it as evidence of insanity, or by withholding psychiatric evidence from the jury. The defence, if supported by medical evidence, should be adjudicated upon by the triers of fact, and if successful should result in an ordinary acquittal. But what is urgently needed is that the psychiatrist who deposes to dissociation in improbable circumstances should be subjected to skilled and deeply sceptical cross-examination, and that the Crown should, where possible, call counter-evidence.

Williams' concern about proper evidence is met, I think, by Dickson J.'s description of the evidential burden in *Rabey*.

67 Thirdly, the jurisprudential root of the "internal cause" theory is suspect. *Rabey* traced the doctrine to *Quick*, but as was also pointed out by Williams, *supra*, at p. 675:

> To say that the presence of an external cause of mental trouble saves a man from the imputation of madness, as was held in *Quick*, does not imply that the absence of an external cause necessarily means that he is mad.

68 Fourthly, *Rabey* contemplated that some psychological blows could be classified as internal causes and others as external causes. Thus Ritchie J. adopted in *Rabey*, at p. 520, the following observation of Martin J.A. in the Ontario Court of Appeal at p. 22:

> ...the ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a "disease of the mind". To hold otherwise would deprive the concept of an external factor of any real meaning.

Nevertheless, a psychological blow sufficient to unhinge the ordinary person could potentially open up a plea of non-mental disorder automatism, *per* Martin J.A. at p. 22, cited by Ritchie J., at p. 520:

> I leave aside until it becomes necessary to decide them, cases where a dissociative state has resulted from emotional shock without physical injury, resulting from such causes, for example, as being involved in a serious accident although no physical injury has resulted; being the victim of a murderous attack with an uplifted knife, notwithstanding that the victim has managed to escape physical injury; seeing a loved one murdered or seriously assaulted, and the like situations. Such extraordinary external events might reasonably be presumed to affect the average normal person without reference to the subjective makeup of the person exposed to such experience. [Emphasis added.]

The introduction of an "average normal person" test would potentially inject an objective fault standard into the Crown's burden of proof of the *actus reus* and *mens rea*, and thereby create *Charter* problems: see *R. v. Martineau*, [1990] 2 S.C.R. 633 (S.C.C.), and *Cameron,supra*, at pp. 273-74, *per* Doherty J.A. More pertinent, for

present purposes, is the point made in the dissent of Dickson J., in *Rabey*, at p. 548:

> It is not clear to me why, as a matter of law, an emotional blow, which can be devastating, should be regarded as an external cause of automatism in some circumstances and an internal cause in others....

In short, the conceptual problems associated with the "internal cause" theory amply justify downgrading its status to an "analytical tool" (*Parks* , p. 902). A judicially created construct such as the "internal cause theory" does not justify taking away from the jury any case of" lack of consciousness throughout the commission of the offence" just because the accused is unable to identify a specific "external cause". Such an accused, who has met the evidential burden of showing that his or her conduct was unconscious and involuntary should not always be absorbed into what would in his or her case be an artificial debate developed in the context of *conscious* conduct about whether the accused lacked the capacity to appreciate "the nature and quality of the act or omission or of knowing that it was wrong".

69 The other philosophical root of the *Parks* analysis is the "continuing danger" theory. The law on automatism is correctly concerned with public safety, and one problem is how to assess the likelihood of recurrence of the violent conduct. As mentioned by Devlin J. in *Hill v. Baxter* (1957), [1958] 1 Q.B. 277 (Eng. Q.B.), at pp. 285-86:

> For the purposes of the criminal law there are two categories of mental irresponsibility, one where the disorder is due to disease and the other where it is not. The distinction is not an arbitrary one. If disease is not the cause, if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free. But if disease is present, the same thing may happen again, and therefore, since 1800 (Criminal Lunatics Act, 1800), the law has provided that persons acquitted on this ground should be subject to restraint. [Emphasis added.]

70 The danger of recurrence was also cited by Lord Denning in *Bratty McNaughten's Case*, *supra*, at p. 410:

> Suppose a crime is committed by a man in a state of automatism or clouded consciousness due to a recurrent disease of the mind. Such an act is no doubt involuntary, but it does not give rise to an unqualified acquittal, for that would mean he would be let at large to do it again. The only proper verdict is one which ensures that the person who suffers from the disease is kept secure in a hospital so as not to be a danger to himself or others. [Emphasis added.]

71 Dickson J., in *Rabey* , also sought to relate the public policy concern about insanity to the "continuing danger theory". While neither the M'Naghten Rules nor s. 16 of the *Code* say anything explicitly about the danger of recurrence, the fact is that an isolated act of violent behaviour, however serious, presents different public policy issues than does conduct rooted in imbecility or other organic disease of the mind which has struck once and may prompt a further act of violence in future. The risk of recurrence is thus legitimately part of the "policy component" of the legal analysis of" disease of the mind".

72 La Forest J. in *Parks* cited with approval, at pp. 906-07, the English Court of Appeal (Criminal Division) in *R. v. Burgess*, [1991] 2 All E.R. 769 (Eng. C.A.), at p. 774:

> It seems to us that if there is a danger of recurrence that may be an added reason for categorising the condition as a disease of the mind. On the other hand, the absence of the danger of recurrence is not a reason for saying that it cannot be a disease of the mind.

Thus La Forest J. concluded, at p. 905, that the "continuing danger" theory is simply" a factor at the policy stage of the inquiry". In the present case, neither psychiatrist considered recurrence a significant possibility.

73 In the circumstances, I do not think that the majority decision in *Rabey* justified the courts in British Columbia in depriving the appellant of the benefit of the evidentiary ruling in his favour on the issue of involuntariness. Where, as here, the trial judge concludes that there was evidence reasonably capable of belief that the accused was in *fact* unconscious throughout the commission of the offence, it is not fatal if the accused fails to go on to establish a *cause* of that state of alleged unconsciousness which the courts can describe as "external". As it is rare for an accused to meet even an *evidential* burden in this sort of case, it is not realistic to talk of a "floodgates" problem. The defence psychiatrist, trained to spot feigned symptoms, says that in his opinion the testimony of the appellant is credible, and finds the symptoms described by the appellant to be credibly related to the alleged unconsciousness. An inability to identify the mechanism of the brain that allegedly rendered him unconscious, except in the very general terms offered by Dr. Janke, may of course undermine the credibility of his story that he lost consciousness in the first place. However, the task of the appellant was to demonstrate the *fact* of unconsciousness (in the sense of lack of awareness and control). It was not incumbent upon him to satisfy the court as to the *cause* of his condition or lose the benefit of the evidentiary ruling. In effect, *Rabey* takes the involuntariness defence which the accused seeks to raise and substitutes for it an insanity defence which neither the accused nor the medical experts can plausibly support. At this point, it is worth reminding ourselves what Cory J. said in *Daviault*, at p. 91:

> In my view, the mental element of voluntariness is a fundamental aspect of the crime which cannot be taken away by a judicially developed policy.

74 It follows, I think, that once the trial judge exercised his gatekeeper function to screen frivolous or feigned claims, it was for the jury to make up its mind on the credibility of the plea of automatism. This jurisdiction should not be removed by "judicially created policy". It is to be expected that the jury will subject the evidence of involuntariness to appropriate scrutiny. There was discussion in *Rabey* about the need to maintain the credibility of the justice system. In my view, the jury is as well placed as anyone in the justice system to uphold its credibility. The bottom line is, after all, that the task of weighing the credibility of such defences was confined by Parliament to the jury. The Court should respect the allocation of that responsibility.

(c) Ground 3: The Contention that the Mental Disorder Provisions of the Criminal Code Were Appropriate to Resolve the Automatism Issue on the Facts of This Case

75 The third major submission on behalf of the Crown was that quite apart from this Court's decision in *Rabey* the present case was correctly subjected to the NCRMD provisions of s. 16 of the *Code*. The Crown says that here the operating cause of the dissociation was a "disease of the mind", giving that concept its full *legal* scope, and in such situations questions of involuntariness are properly subsumed into the NCRMD analysis. This is despite the fact that in this case all the experts were agreed that the appellant did not suffer from any" disease of the mind" known to medicine. I accept, as stated, that" disease of the mind" is a legal concept, but nevertheless a significant disconnection between law and medicine on this point will often impose a measure of artificiality to create the medical equivalent of trying to pound square pegs into round holes.

76 The issue here is not whether the law, as a matter of policy, can expand its concept of "disease of the mind" to include conduct that has traditionally been considered non-insane automatism. It can do so. The question here is quite different. We are asked to say that even if the plea of NCRMD fails, the Court will still, by an

act of judicial policy, relieve the Crown of the burden of proving the most contentious element of the *actus reus* by taking the issue of voluntariness away from the jury.

77 It is true that if statements relating voluntariness to the *actus reus* are applied mechanically, even a violent accused suffering from a disease of the mind in which "the mind does not go with what is being done" (*Rabey* (S.C.C.), *supra*, at p. 513, quoting *R. v. K., supra*, at p. 84) could demand an absolute acquittal. This was the position at common law, *per* Devlin J. in *R. v. Kemp*, [1956] 3 All E.R. 249 (Eng. Q.B.), at p. 251:

> In the eyes of the common law if a man is not responsible for his actions he is entitled to be acquitted by the ordinary form of acquittal, and it matters not whether his lack of responsibility was due to insanity or to any other cause.

In response to the public danger posed by such an outcome, and to a developing understanding of mental disorder, the courts started down the path that eventually subsumed the notion of involuntary conduct into the concept of insanity where the involuntary conduct could be identified as the product of a disease of the mind. A successful plea of insanity led to the verdict of "not guilty by reason of insanity", which carried with it the possibility of indefinite detention at the pleasure of the state.

78 The problem is that while s. 16 of the *Code* may provide an appropriate structure to resolve cases of medically defined "diseases of the mind", it may not be responsive to the real issues in cases where the" disease of the mind" derives from legal classification, rather than medical classification. The view of the Canadian Psychiatric Association that all causes of automatism are mental disorders was not accompanied by any ringing endorsement that in all such cases s. 16 of the *Code* provides an appropriate analytical framework. The focus of the NCRMD provisions of the *Code* is clearly different from the focus of automatism. The latter addresses whether the conduct was voluntary. The former looks at one possible cause of automatism, and asks questions about the impact of the disease of the mind on legally relevant aspects of mental capacity.

79 The existence of a "disease of the mind" is a threshold issue in s. 16. The real question, to paraphrase Lord Diplock in *R. v. Sullivan* (1983), [1984] A.C. 156 (U.K. H.L.), at p. 172, is whether "the effect of a disease is to impair these [mental] faculties so severely as to have either of the consequences referred to" in s. 16(1), namely whether the disease rendered the accused" incapable of appreciating the nature and quality of the act or omission or knowing that it was wrong".

80 It is clear, in other words, that "the consequences referred to" in s. 16 are directed to issues other than voluntariness. There is much to be said for the observation of Professor D. Stuart in *Canadian Criminal Law: A Treatise* (3rd ed. 1995), at p. 108:

> A "disease of the mind" is only one requirement of the legal defence of insanity. If that defence fails *for any reason*, surely justice dictates that the jury may consider sane automatism. *MacLeod* [*R. v. MacLeod* (1980), 52 C.C.C. (2d) 193 (B.C.C.A.)] decides that psychiatric labelling might well prevent the defence of sane automatism from being put although it is *not* the sole barometer of legal insanity. [Emphasis in original.]

81 Two further points emerge from a consideration of s. 16 of the *Code*. Firstly, Parliament has not alluded to whether the conduct is voluntary or involuntary. It is sufficient that the acts occurred or omissions were made at a time when the accused suffered from "a mental disorder" (defined in s. 2 as a "disease of the mind"). Secondly, Parliament addressed the *capacity* of the accused, not proof of the existence or absence of a particular *mens rea* on the particular facts. The finding of a mental disorder therefore displaces the ordinary rules govern-

ing criminal responsibility, including voluntariness, and places an accused in the grip of the statutory scheme created to deal with the individuals whom the law used to describe as "criminally insane".

82 The difficulty of subsuming the issue of voluntariness into the different issue of mental disorder in cases such as the present was noted 40 years ago by Gresson P. of the New Zealand Court of Appeal in *Cottle*, *supra*, at p. 1009. In a decision much commented upon by members of the House of Lords in *Bratty*, *supra*, Gresson P., at p. 1009, expressed his concern about the M'Naghten Rules being applied to an accused who simply lacked volition:

> We must accept the position as it is, but we cannot escape the difficulty that the M'Naghten Rules were never intended to apply to a case where the act was done without volition or consciousness of doing it. The M'Naghten formula takes account only of the cognitive faculties and presupposes that the doer was conscious of his actions. Nevertheless, it has become the practice to regard a person as "incapable of understanding the nature and quality" of his act when in truth he was not conscious of having acted at all; and to treat the formula as applicable to cases of automatism.... It is unfortunate that there should have been this too-liberal application of the M'Naghten Rules. [Emphasis added.]

83 The s. 16 question has an air of artificiality in the case of someone who claims to have been unconscious at the material time. If true, he or she not only failed to appreciate "the nature and quality of the act" but also failed to appreciate that the act was taking place at all. If false, the accused is simply untruthful. Nevertheless, the presence of a "disease of the mind" does trigger the application of s. 16, and an accused whose automatism is a product of a disease of the mind should be found NCRMD instead of being acquitted. The concept of "disease of the mind" is, and should continue to be, controlled by legal considerations rather than purely medical considerations.

84 At the same time, where as here medical experts for the prosecution and the defence agree that there is no "disease of the mind" known to medicine, and the only justification offered in support of attributing the conduct to mental disorder is the inability of an accused to identify an "external" cause, there is, in my view, an insufficient basis for (i) shifting the persuasive burden of proof from the Crown to the defence under s. 16, and (ii) taking the issue of non-mental disorder automatism away from the jury.

85 The appellant's point is that the jury's rejection of the plea of mental disorder automatism may have been because they disbelieved his version of events, or it may be because they thought his acts, though involuntary, were not the product of any disease of the mind. Failure to put the issue of non-mental disorder automatism thus deprived him of a potential acquittal on an issue for which the trial judge ruled he had laid a proper evidentiary foundation. It is on that basis that the appellant says the judge-made rule violates the presumption of his innocence under s. 11(*d*) of the *Charter* and took away an important element of his right under s. 11(*f*) of the *Charter* to have his fate determined by the jury. The conclusion that the issue of non-mental disorder automatism ought to have been left with the jury in this case is, I think, consistent with the observations of the majority of the members of the Australian High Court in *Falconer* , *supra*, and in particular the views of Deane and Dawson JJ. (p. 266), Toohey J. (p. 273 and p. 281), and Gaudron J. (p. 285) to the effect that evidence which credibly puts in issue the voluntariness of the acts of the accused (i.e., whether the act or omission occurred independently of the exercise of his will) must be put to the jury.

86 It is open to the Crown or defence to establish on a balance of probabilities a mental disorder. The Crown, of course, must follow the rule in *R. v. Swain*, [1991] 1 S.C.R. 933 (S.C.C.), which prevents the admis-

sion of evidence relating to mental disorder by the Crown until the defence puts in issue the mental capacity of the accused for criminal intent, as explained by Lamer C.J., at p. 976:

> Thus, although it is a principle of fundamental justice that an accused has the right to control his or her own defence, this is not an "absolute" right. If an accused chooses to conduct his or her defence in such a way that that accused's mental capacity for criminal intent is somehow put into question, then the Crown will be entitled to "complete the picture" by raising its own evidence of insanity and the trial judge will be entitled to charge the jury on s. 16. [Emphasis added.]

The same point was made by La Forest J. in *Parks*, *supra*, at p. 898, in relation to automatism:

> If the accused pleads automatism, the Crown is then entitled to raise the issue of insanity, but the prosecution then bears the burden of proving that the condition in question stems from a disease of the mind; see *Rabey, supra*, at pp. 544-45.

If the jury were satisfied that the s. 16 requirements were met, that would end the matter: the appellant would have been found not criminally responsible on account of mental disorder (NCRMD). He or she would not be permitted to ignore NCRMD status and seek a full acquittal on the basis of involuntariness. However, in my view, if the jury rejects NCRMD status, it should still be left with the elementary instruction that the accused is entitled to an acquittal if the Crown fails to establish beyond a reasonable doubt all of the elements of the offence, including voluntariness.

(4) Competence of the Jury

87 For these reasons, it is my view that, the trial judge having ruled that the appellant had successfully discharged the evidential onus, the appellant was entitled to have the issue of voluntariness put to the jury. In reaching that conclusion I have not forgotten the sceptical observation of Williams noted earlier, at pp. 673-74:

> How strange, the layman may say, and how very convenient for the defendant, that this alleged state of dissociation descended on him at the very moment when he had reason for evading the police, or when he was face to face with a person whom he had a strong motive for attacking. [Emphasis added.]

It is significant that the author pointedly refers to "the layman" and suggests that the layman's common sense would make quick work of the legal complexities conjured up by the jurisprudence on the topic of automatism. Nor have I forgotten Dickson J.'s concern about the potential for fake pleas of automatism which he expressed in *Rabey* at p. 546:

> There are undoubtedly policy considerations to be considered. Automatism as a defence is easily feigned. It is said the credibility of our criminal justice system will be severely strained if a person who has committed a violent act is allowed an absolute acquittal on a plea of automatism arising from a psychological blow. The argument is made that the success of the defence depends upon the semantic ability of psychiatrists, tracing a narrow path between the twin shoals of criminal responsibility and an insanity verdict. Added to these concerns is the *in terrorem* argument that the floodgates will be raised if psychological blow automatism is recognized in law.

In part, Dickson J.'s answer to these concerns was to specify the content of the evidential burden resting on an accused, requiring (at p. 552) that the evidence of the accused

> ...should be supported by expert medical opinion that the accused did not feign memory loss and that there is no underlying pathological condition which points to a disease requiring detention and treatment.

Under the Dickson approach, the medical expert has to vouch for the credibility of the accused's evidence of unconsciousness, and thus involuntariness.

88 More profoundly, however, I think Dickson J.'s response to these concerns was an endorsement of the role of the jury contemplated by Parliament as he expressed, for example, in *R. v. Corbett*, [1988] 1 S.C.R. 670 (S.C.C.), at p. 693:

> It is of course, entirely possible to construct an argument disputing the theory of trial by jury. Juries are capable of egregious mistakes and they may at times seem to be ill-adapted to the exigencies of an increasingly complicated and refined criminal law. But until the paradigm is altered by Parliament, the Court should not be heard to call into question the capacity of juries to do the job assigned to them.

to which he added, at pp. 693-94:

> We should maintain our strong faith in juries which have, in the words of Sir William Holdsworth, "for some hundreds of years been constantly bringing the rules of law to the touchstone of contemporary common sense" (Holdsworth, *A History of English Law* (7th ed. 1956), vol. I, at p. 349).

89 The common sense of members of the jury is a fundamental and vital part of our criminal justice system. As Cory J. stated in *Osolin*, *supra*, at p. 683: "The jury system has in general functioned exceptionally well. Its importance has been recognized in s. 11(*f*) of the *Charter*". More specifically, in the context of intoxication and *mens rea*, Dickson C.J. observed in *R. v. Bernard*, [1988] 2 S.C.R. 833 (S.C.C.), at p. 848, quoting *R. v. Hill* (1985), [1986] 1 S.C.R. 313 (S.C.C.), at p. 334:

> I have the greatest of confidence in the level of intelligence and plain common sense of the average Canadian jury sitting on a criminal case. Juries are perfectly capable of sizing the matter up.

The jury in this case, for example, had before it the testimony of the Crown psychiatrist that the appellant's violent response to his wife's verbal attack was entirely too purposeful and the loss of memory entirely too convenient to be considered "involuntary". The members of the jury could, I think, have been counted on to exhibit powerful scepticism about such evidence. Anyone who thinks a jury of bus drivers, office workers and other practical people will be less sceptical than members of the bench or professors of law has perhaps spent insufficient time in buses or around office coffee machines.

(5) Conclusion on the Automatism Issue

90 In the result, I believe the appellant was entitled to have the plea of non-mental disorder automatism left to the jury in this case in light of the trial judge's evidentiary ruling that there was evidence the appellant was unconscious throughout the commission of the offence, for the following reasons.

91 Firstly, I do not accept the Crown's argument that a judge-made classification of situations into mental disorder automatism and non-mental disorder automatism can relieve the Crown of the obligation to prove all of the elements of the offence, including voluntariness. As stated, such an interpretation encounters strong objections under s. 7 and s. 11(*d*) of the *Charter*, and there has been no attempt in this case to provide a s. 1 justification.

92 Secondly, imposition of a persuasive burden of proof on the appellant to establish "involuntariness" on a balance of probabilities, in substitution for the present evidential burden, runs into the same *Charter* problems, and no attempt has been made in the record to justify it.

93 Thirdly, the "internal cause" theory, on which the Crown rested its argument, cannot be used to deprive the appellant of the benefit of the jury's consideration of the voluntariness of his action, once he had met the evidential onus, without risking a violation of s. 11(*f*) of the *Charter*. *Rabey* 's treatment of the internal cause theory has to be looked at in light of the decision of this Court in *Parks*, *supra*, which signalled some serious reservations about the usefulness of the "internal cause" theory, except as an "analytical tool". *Rabey*, as clarified in *Parks*, does not impose a presumption that a lack of voluntariness must be attributed to the existence of a mental disorder any time there is no identification of a convincing external cause. Once the appellant in this case had discharged his evidential onus, he was entitled to have the issue of voluntariness go to the jury.

94 Fourthly, it was wrong of the courts to require the appellant to substitute for his chosen defence of involuntariness the conceptually quite different plea of insanity. One of the few points of agreement between the defence and Crown experts at trial was that the appellant did not suffer from anything that could be described medically as a disease of the mind. He was either unconscious at the time of the killing or he was not telling the truth at the time of the trial. This was a question for the jury. The statutory inquiry into whether he was "suffering from a mental disorder" that rendered him "incapable of appreciating the nature and quality of the act of omission or knowing that it was wrong" are qualitative questions that are not really responsive to his allegation that he was not conscious of having acted at all.

95 Finally, the evidence established that there *are* states of automatism where perfectly sane people lose conscious control over their actions. At that point, it was up to the jury, not the judge, to decide if the appellant had brought himself within the physical and mental condition thus identified. As Dickson C.J. observed in *Bernard*, *supra*, at p. 848, the jurors were" perfectly capable of sizing the matter up".

B. Forced Disclosure of Expert Report to Crown

96 The appellant advanced a second issue on the conviction appeal, asserting that the trial judge had made a reversible error in ordering the production of Dr. Janke's report to the Crown at the outset of the defence case. McEachern C.J. agreed that a report prepared by a defence expert would normally be privileged and not properly subject to a disclosure order. However, he held that in light of comments made by defence counsel at the opening of the defence case, and the fact Dr. Janke's report would have been disclosed in any event as soon as he took the witness stand, premature disclosure had not occasioned any miscarriage of justice.

97 In my view, it was unnecessary to rely on the curative provision of s. 686 in this case. The appellant, through his counsel, waived the privilege in the report at the opening of the defence case. At that time defence counsel made the following references to the content of Dr. Janke's anticipated evidence:

> As I have indicated earlier, you have heard during the Crown's case what happened. You are now about to hear from Mr. Stone and from a forensic psychiatrist, Dr. Janke, why it happened. Dr. Janke will explain that Mr. Stone's state of mind at the time of the killing was known in psychiatric terms as a dissociative state.
>
> . . . . .

> Dr. Janke is a psychiatrist who works in private practice, on contract with the government, and he teaches at UBC. He will give evidence to explain in psychiatric terms his diagnosis of Mr. Stone's state of mind at the time of the attack. He will say that Mr. Stone was in a dissociative state or acting as an automaton, that is, somebody who is acting unconsciously. He will say that as Mr. Stone was not acting consciously, he could not have intended to kill his wife. [Emphasis added.]

98 By disclosing what he wanted from the report in favour of the accused, defence counsel could not then conceal the balance of the report whose contents might contradict or put in context what had been disclosed. It is true that Dr. Janke's report included not only his diagnosis, but a recital of the facts as provided by the appellant and which formed the basis of his expert opinion. It was through disclosure of the report, for example, that the Crown learned that the accused, contrary to his initial trial testimony, appeared to have some recall of the beginning of the fatal assault by way of a dream. The contents of the report, including the statements attributed to the appellant, were of course known to defence counsel at the time he chose to make the disclosure to the jury. It was not open to the appellant to pick and choose the portions of an expert report to be put before the trier of fact. Accordingly, the trial judge acted appropriately by ordering the production of Dr. Janke's report at the conclusion of the defence opening address.

99 However, I would also, if it were necessary, give effect to the alternative ground accepted by McEachern C.J. The act of calling of Dr. Janke would certainly constitute waiver of any privilege attached to his report. As noted by McEachern C.J., once a witness takes the stand, he/she can no longer be characterized as offering private advice to a party. They are offering an opinion for the assistance of the court. As such, the opposing party must be given access to the foundation of such opinions to test them adequately. Given the fact that the report would have to have been disclosed after Dr. Janke's direct examination, the prior disclosure of the report cannot be said to have had any material impact on the outcome of the trial. Absent the earlier disclosure, the Crown would have been entitled to stand the appellant down before completing its cross-examination of him, and to recall him once they had been given an opportunity to consider the contents of the report. Accordingly, even if defence counsel's opening address had been insufficient to trigger disclosure, s. 686(1)(*b*)(iii) of the *Code* would properly be applied to cure the error.

IV. Disposition

100 In the result, I would have allowed the appeal, set aside the order of the British Columbia Court of Appeal and directed a new trial. Had I shared the conclusion of Bastarache J. to dismiss the appeal against conviction, I would also have concurred in the dismissal of the Crown's appeal on sentence for the reasons he gives.

***Bastarache J.* (*L'Heureux-Dubé, Gonthier, Cory* and *McLachlin JJ.* concurring):**

101 The present case involves automatism, and more specifically, "psychological blow" automatism. The appellant claims that nothing more than his wife's words caused him to enter an automatistic state in which his actions, which include stabbing his wife 47 times, were involuntary. How can an accused demonstrate that mere words caused him to enter an automatistic state such that his actions were involuntary and thus do not attract criminal law sanction? This is the issue raised in this appeal.

I. Facts

102 The appellant was charged with the murder of his wife, Donna Stone. At trial, the appellant admitted

killing his wife. In his defence, the appellant claimed: insane automatism, non-insane automatism, lack of intent, and alternatively, provocation.

103 The appellant met Donna Stone in the spring of 1993 and the two were married on May 8, 1993. They lived in Winfield, British Columbia, in the Okanagan Valley. This was the appellant's third marriage. He has two teenage sons from his second marriage. His sons live with their mother in Surrey, British Columbia, a suburb of Vancouver.

104 In March 1994, the appellant planned a business trip to Vancouver. He decided to visit his sons while in the Vancouver area. He contacted his second wife and made arrangements to take his sons out for dinner and a movie. The appellant did not tell Donna Stone of his intention to travel to Vancouver and visit his sons because she did not get along with them.

105 According to the appellant, Donna Stone learned of his intention to go to Vancouver. She demanded to go along with him and said she would follow him in another vehicle if he did not take her. The appellant agreed to take her with him to Vancouver.

106 The appellant testified that Donna Stone berated him throughout the drive to Vancouver and objected to his visit with his sons. Nevertheless, the appellant drove to the home of his second wife for the planned visit with his sons. The visit lasted only 15 minutes because Donna Stone threatened to "lay on the horn until the police come".

107 The appellant testified that after the brief visit with his sons, he and Donna Stone drove towards Vancouver. According to the appellant, Donna Stone asked him if he wanted a divorce. He responded that they might as well get divorced if she was not going to let him see his sons. This answer upset the victim and she again began to berate the appellant.

108 The appellant testified that he pulled into an empty lot and turned off the truck's engine while Donna Stone continued to yell at him:

> ...I sat there with my head down while she's still yelling at me that I'm nothing but a piece of shit and that when she had talked to the police, that she had told them lies, that I was abusing her, and that they were getting all the paperwork ready to have me arrested, and that all she had to do was phone them; and once they had me arrested, that she was going to get a court order so that I wouldn't be allowed back onto our property and that I would have to go and live with my mother and run my business from there, that she was going to quit working and she was just going to stay in the house with her children and that I would have to pay her alimony and child support.
>
> ...Well, she just continued on and she just said that she couldn't stand to listen to me whistle, that every time I touched her, she felt sick, that I was a lousy fuck and that I had a small penis and that she's never going to fuck me again, and I'm just sitting there with my head down; and by this time, she's kneeling on the seat and she's yelling this in my face....

109 The appellant testified that the victim's voice began to fade off. He recalls wondering why she was treating him and his children in this way. He also remembers thinking about how people in the small town in which he lived would look at him if his wife had him arrested. The appellant then remembers a "whoosh" sensation washing over him from his feet to his head. According to the appellant, when his eyes focussed again, he

was staring straight ahead and felt something in his hand. He was holding a six-inch hunting knife which he kept in the truck. He looked over and saw Donna Stone slumped over on the seat. He knew she was dead. It would later be determined that Donna Stone died from loss of blood resulting from 47 stab wounds.

110 The appellant testified that he opened the passenger door and Donna Stone's body fell out onto the ground. After five to 10 minutes, the appellant put his wife's body in a toolbox in the back of his truck. He then washed the blood from his hands in a puddle, removed his bloody clothes and put on extra clothes he kept in the truck. The appellant then pulled out of the empty lot and drove to a nearby motel where he asked for directions home and purchased a six-pack of beer to calm his nerves.

111 According to the appellant, he arrived home around 3:00 a.m. He did not immediately go in because the lights were on and he feared someone was still awake. The appellant parked down the road until 6:00 a.m. He then drove the truck into his garage and went into the house where he cleaned up and packed a few shirts. He left a note for his step-daughter, the daughter of the victim:

> Sorry, Nicole, but she just wouldn't stop yelling at me. My loan to the bank, credit union has insurance on it if I die. Love Bert.

112 The appellant testified that he checked into a hotel so he could take a shower and shave. He then collected an outstanding debt, sold a car he owned and took a cab to the airport. He flew to Mexico. While in Mexico, the appellant awoke one morning to the sensation of having his throat cut. In trying to recall his dream, he remembered stabbing Donna Stone twice in the chest *before* experiencing the "whooshing" sensation.

113 Donna Stone's body was found in the tool box in the appellant's truck two days after her death.

114 The appellant returned to Canada approximately six weeks later on May 2, 1994. The next day he spoke to a lawyer and then surrendered himself to police.

II. Psychiatric Evidence

115 Two psychiatrists gave evidence in this case. The defence psychiatrist, Dr. Janke, interviewed the appellant on two occasions approximately 18 months after the killing. The Crown psychiatrist, Dr. Murphy, interviewed the appellant for one hour on the seventh day of the trial.

A. Evidence of Dr. Janke

116 Dr. Janke testified that a dissociative episode is a medical term for a circumstance in which an individual's thinking component, including his judgment and ability to know what he is doing, splits from his physical body. According to Dr. Janke, dissociation can be caused by a psychological blow and is often accompanied by partial to complete memory loss. Dr. Janke was unaware of any cases in which a violent dissociative episode had recurred.

117 Dr. Janke testified that the appellant's account of the facts in this case was consistent with a dissociative episode caused by a series of psychological blows. In particular, Dr. Janke noted that the following facts are consistent with dissociation: Donna Stone's words immediately prior to the killing were extreme; the appellant's second wife reported that two to three hours before the killing the appellant seemed out of character; the appellant reported experiencing a "whooshing" sensation followed by a re-awareness stage; the appellant reported decreasing concentration, difficulty following driving directions and memory loss; and the attack was of a fren-

zied, overkill nature.

118 In Dr. Janke's opinion, the appellant was in a dissociative state for at least the majority of the attack on Donna Stone. According to Dr. Janke, this state resulted from Donna Stone's extreme insults which must be viewed in the context of the stress the appellant had endured throughout the day. However, Dr. Janke qualified his opinion by noting that it was largely dependant on the accuracy and truthfulness of the appellant's account of events.

119 According to Dr. Janke, there was no evidence that the appellant suffered from any psychiatric or physical condition which could have been responsible for a dissociative episode. The only psychological factor the appellant possessed which may have contributed to a dissociative episode was his tendency not to be aware of his emotional state. Dr. Janke considered this factor to be within the normal range of human behaviour.

120 Dr. Janke agreed that the appellant told him that while he was in Mexico, he" became aware of a memory of having a knife in his hand and stabbing Donna Stone twice in the chest *before* having the 'whooshing' sensation" (emphasis added). However, Dr. Janke pointed out that an individual who has had a dissociative episode is usually unable to sequence memories of events surrounding the episode accurately and chronologically.

B. Evidence of Dr. Murphy

121 Dr. Murphy agreed with much of Dr. Janke's evidence about dissociation generally. For example, she accepted his explanation of what dissociation is. She also agreed that dissociation is often accompanied by memory loss and an inability to sequence memories of events surrounding the episode accurately and chronologically. Like Dr. Janke, Dr. Murphy was unaware of any cases in which a violent dissociative episode had recurred.

122 In relation to the appellant's claim of dissociation, Dr. Murphy testified that it is possible that the appellant was in a dissociative state when he killed Donna Stone. However, she noted that there is no scientific method of completely ruling out a claim of dissociation once it has been made. Furthermore, she opined that although it is possible, it is extremely unlikely that the appellant was in a dissociative state when he killed his wife. Dr. Murphy's scepticism was based upon several factors. First, she pointed out that the appellant's reported decrease in concentration, difficulty following driving directions and memory loss were common phenomenon which, though consistent with dissociation, could easily be attributed to a number of other factors. In particular, the appellant's reported lack of memory in itself is not conclusive since up to 50 per cent of people who are charged with serious crimes report that they do not remember the incident. Dr. Murphy also pointed out that the frenzied, overkill nature of the attack was equally consistent with rage as with dissociation.

123 Dr. Murphy noted that the mind and body of a person in a dissociative state have been split. For this reason, she would expect that there would usually be no connection between the dissociated acts and the social context immediately preceding them. For example, a person who is watching television with a group of people might get up and urinate in front of the others. According to Dr. Murphy, the fact that Donna Stone was both the trigger of the dissociative episode and the victim of the appellant's dissociated violence renders the appellant's claim of dissociation suspect.

124 Finally, Dr. Murphy noted that Dr. Janke's opinion that the appellant had experienced a dissociative episode was based almost exclusively on the appellant's account of events. She testified that psychiatrists must

view claims of dissociation with suspicion if they are made in legal contexts where the claimant has an obvious interest in a favourable disposition. In such circumstances, the evidence of bystanders who can corroborate the claimant's explanation of events and provide information about the appearance of the claimant at the time of the incident is an important element in confirming the validity of a claim of dissociation.

125 Dr. Murphy agreed with Dr. Janke that there was no evidence that the appellant suffered from any medically recognized psychiatric disorder which could have been responsible for a dissociative episode.

III. Judicial History

A. British Columbia Supreme Court — Brenner J.

(1) Ruling on Whether to Instruct the Jury on Automatism

126 Brenner J. considered whether or not to put the defence of automatism to the jury in the context of a *voir dire*. He identified his first task: to determine, as a question of law, whether the defence had raised sufficient evidence of involuntariness such that the general defence of automatism was entitled to be put to the jury.

127 Brenner J. then turned to the definition of automatism. He cited the definition of Dickson J., as he then was, speaking in dissent in *R. v. Rabey*, [1980] 2 S.C.R. 513 (S.C.C.), at p. 552:

> In principle, the defence of automatism should be available whenever there is evidence of unconsciousness throughout the commission of the crime, that cannot be attributed to fault or negligence of his part.

128 Noting that this definition had been approved by La Forest J., speaking for the majority of this Court, in *R. v. Parks*, [1992] 2 S.C.R. 871 (S.C.C.), at p. 905, Brenner J. concluded that the defence of automatism is only available where there is evidence of unconsciousness *throughout the commission of the crime*. However, the evidence in the present case revealed that while in Mexico, the appellant recalled inflicting two of the stab wounds to Donna Stone's chest before experiencing the "whooshing" sensation. Nevertheless, since automatism had been left with juries in other British Columbia cases in which accused persons had partial recollection of the crime, Brenner J. concluded that the authorities did not exclude the availability of this defence merely because the appellant has some recollection of what happened.

129 Brenner J. held that in the present case there was evidence of unconsciousness throughout the commission of the crime because the only recollection of events had come to the appellant in a dream several days after he had killed Donna Stone. As a result, he found that the defence had laid the proper evidentiary foundation for the general defence of automatism. Brenner J. then correctly identified the second question before him: whether insane or non-insane automatism should be left with the jury.

130 Brenner J. found the case of *R. v. MacLeod* (1980), 52 C.C.C. (2d) 193 (B.C. C.A.), indistinguishable. In *MacLeod*, the British Columbia Court of Appeal applied this Court's decision in *Rabey*, *supra*, holding that where the only possible cause of the accused's dissociative state was anxiety, an internal factor, the accused must have been suffering from a disease of the mind in the legal sense and accordingly only insane automatism should be left with the jury.

131 Applying *MacLeod*, Brenner J. ruled that the only form of automatism available to the appellant was insane automatism. As a result, he instructed the jury on insane automatism, intention in relation to second degree murder and provocation. He then set out three possible verdicts open to the jury: not criminally responsible on

account of mental disorder, guilty or not guilty of the offence of second degree murder, and guilty of the included offence of manslaughter. The jury found the appellant criminally responsible but not guilty of second degree murder. Brenner J. directed a verdict on the included offence of manslaughter.

(2) Ruling on the Disclosure of the Defence Expert Report to the Crown

132 In opening remarks, counsel for the defence stated that the evidence which would be given by Dr. Janke, the defence psychiatrist, would support the defence of automatism. At the conclusion of the defence's opening remarks, the Crown requested production of a copy of the report prepared by Dr. Janke. The Crown submitted that it required the report to cross-examine the appellant on the statements he had made to Dr. Janke. According to the Crown, this was necessary in order to assist the jury in determining what weight to place on Dr. Janke's assessment. The defence denied the Crown's request claiming that it had no obligation to produce the report. However, the defence acknowledged that it would nevertheless supply the Crown with a copy of the report at the end of the appellant's testimony. The defence made no claim of privilege.

133 Brenner J. ordered the defence to produce Dr. Janke's report immediately stating that "the Crown ought to be in a position of being able to explore on cross-examination with the accused whatever statements Dr. Janke may or may not have relied upon in his report". The Crown relied on the report in its cross examination of the appellant.

(3) Sentencing

134 A sentencing hearing was held on December 1, 1995 before Brenner J. Defence counsel argued that a sentence of one to two years was appropriate, in addition to the 18 months the appellant had already spent in custody. The Crown suggested a sentence of 15 years to life imprisonment. The Crown agreed that the 18 months the appellant had already spent in custody had to be taken into account in determining an appropriate sentence.

135 Brenner J. began by noting that the jury had accepted the defence of provocation, and the appellant had accordingly been convicted of manslaughter rather than second degree murder. After reviewing the circumstances of the offence and the appellant's background, he concluded that the principle concern of this sentencing was general deterrence, specifically noting in particular that this was an offence of domestic violence.

136 Brenner J. was of the opinion that sentencing had to be assessed in light of the jury's acceptance of the defence of provocation, while still bearing in mind the brutality of the offence. After reviewing a number of cases, two of which he found particularly relevant — *R. v. Archibald* (1992), 15 B.C.A.C. 301 (B.C. C.A.), and *R. v. Eklund* (September 10, 1985), Doc. Vancouver CA003258 (B.C. C.A.) — Brenner J. sentenced the appellant to a further four years in jail, treating the appellant's 18-month pre-trial custody as the equivalent of a three-year sentence.

B. British Columbia Court of Appeal — (1997), 86 B.C.A.C. 169 (B.C. C.A.) (Conviction) and (1997), 89 B.C.A.C. 139 (B.C. C.A.) (Sentencing)

(1) Should Non-Insane Automatism Have Been Left with the Jury?

137 McEachern C.J. (Cumming and Braidwood JJ.A. concurring) began by reviewing the facts. He then turned to the first ground of appeal: whether the trial judge had erred in failing to leave non-insane automatism

to the jury.

138 McEachern C.J. reviewed the two-step process which must be followed by trial judges when dealing with claims of automatism. First, the judge must determine whether or not the accused has raised sufficient evidence to give the general defence of automatism an air of reality. Next, if this proper evidentiary foundation has been laid by the defence, the trial judge must determine whether insane or non-insane automatism should be left with the trier of fact. This entails determining whether or not the automatism stemmed from a disease of the mind. According to McEachern C.J., at p. 173, "the defence must identify evidence from which the jury could reasonably conclude that the dissociated state was not caused by a disease of the mind. If there is no such evidence, a dissociated state could only result from a disease of the mind".

139 After specifically commenting that the only explanation for the alleged automatism was the critical and insulting words of Donna Stone, McEachern C.J. cited this Court's decision in *Rabey*, *supra*, for the proposition that a violent reaction to psychological trauma is generally attributed to the actor's internal psychological make-up and thus characterized as a disease of the mind, giving rise to a defence of insane, rather than non-insane, automatism.

140 McEachern C.J. then reviewed (at p. 175) this Court's decision in *Parks* and particularly the following words of La Forest J., at p. 902:

> ...that the [internal cause] theory is really meant to be used only as an analytical tool, and not as an all-encompassing methodology. As Watt, J., commented in his reasons in support of his charge to the jury in this case, the dichotomy "constitutes a general, but not an unremitting or universal, classificatory scheme for 'disease of the mind'.

141 McEachern C.J. concluded that La Forest J.'s comments in *Parks* must be read in light of the fact that that case involved sleepwalking, which gives rise to special considerations. He therefore rejected the argument that *Parks* could be cited as authority for the proposition that the trial judge erred in applying the *Rabey* internal cause theory to the facts of the present case. According to McEachern C.J., *Parks* simply recognizes that courts are justified in straying from the internal cause theory if the unique facts of a given case are not well suited to an analysis under that theory.

142 McEachern C.J. correctly noted that the jurisprudence surrounding "disease of the mind" has evolved beyond the strict application of the internal cause theory as dictated in *Rabey*. In particular, later authorities reveal that policy considerations are also to be taken into account in assessing whether or not automatism stems from a disease of the mind.

143 After assessing the relevant case law, McEachern C.J. was not satisfied that the trial judge erred in concluding that the internal cause theory was the best guide based on the bizarre facts of this case. Unlike *Parks* , there were no circumstances which required departure from this approach. Furthermore, there were valid reasons, including policy concerns, supporting the trial judge's decision to reject the expert evidence that the appellant was not suffering from a disease of the mind in a medical sense. There was no indication that the trial judge failed to consider these policy factors in deciding to leave only insane automatism to the jury, particularly since he had made his ruling at *nisi prius* where judges are not expected to articulate all of their reasons. To the contrary, the trial judge's reference to *Parks* indicated that he was aware of his duty to take policy considerations into account in assessing which species of automatism to leave with the jury.

144 McEachern C.J. concluded that the trial judge had carefully considered all of the evidence and was justified in deciding not to leave sane automatism with the jury. He thus refused to disturb that decision.

(2) Ordered Disclosure of Defence Expert Report to the Crown

145 McEachern C.J. (with Cumming and Braidwood JJ.A. concurring) began by reviewing the facts surrounding the disclosure, including the use the Crown made of Dr. Janke's report in its cross examination of the appellant.

146 Relying on *R. c. Brouillette*, 78 C.C.C. (3d) 350, [1992] R.J.Q. 2776 (Que. C.A.), and *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 (B.C. C.A.), McEachern C.J. concluded that Dr. Janke's report was privileged under the rubric of solicitor's privilege. Despite the fact that the defence did not claim this privilege, the trial judge should have protected the privilege since the report might well have contained prejudicial information unrelated to automatism. McEachern C.J. therefore concluded that he must uphold this ground of appeal unless there was no substantial miscarriage of justice under s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46.

147 In assessing whether there was no substantial miscarriage of justice, McEachern C.J. noted that the defence was entitled to change tactics and not call Dr. Janke despite its opening remarks. He also opined that a statement by counsel that a witness will be called does not constitute a waiver of privilege. However, the Crown was entitled to cross examine the appellant on the statements he had made to Dr. Janke. According to McEachern C.J., if the defence refused to produce the report for this purpose, the Crown could stand the appellant down and resume its cross examination after Dr. Janke had given evidence. After Dr. Janke was called, the Crown was entitled to a copy of his report because privilege of an expert report is waived when the expert takes the stand. Having examined the report and cross-examined Dr. Janke, if there was any discrepancy between the appellant's evidence and what the report indicates he said to the doctor, the Crown could resume its cross examination of the appellant in order to question him about his previous inconsistent statement.

148 McEachern C.J. concluded that there was no substantial miscarriage of justice in the present case because the Crown could properly have achieved the same result using the more complicated procedure examined above. He therefore dismissed this ground of appeal.

(3) Sentencing

149 The Crown had two primary grounds of appeal on the sentencing issue in the Court of Appeal. First, the Crown argued that the trial judge erred in considering provocation as a mitigating factor in sentencing after s. 232 of the *Code* had reduced a verdict of murder to one of manslaughter. Second, the Crown argued that the seven-year sentence imposed by the trial judge was clearly unreasonable.

150 Finch J.A. (Esson and Donald JJ.A. concurring) began by reviewing the circumstances of the offence, the psychiatric evidence and the appellant's background. He then cited this Court's decisions in *R. v. Shropshire*, [1995] 4 S.C.R. 227 (S.C.C.), and *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 (S.C.C.), on the standard of appellate review of sentencing.

151 Finch J.A. rejected the Crown's duplication argument with respect to provocation. He found that the trial judge was correct to consider provocation as a mitigating factor when sentencing the appellant. He reasoned that the provocation evidence was probative as to the appellant's state of mind at the time of the killing and as

such was relevant to the issue of moral blameworthiness. According to Finch J.A., the consideration of this evidence, among all of the other relevant evidence, did not give the appellant a second or unfair benefit.

152 Finch J.A. concluded that the sentence was not clearly unreasonable. It adequately reflected the gravity of the offence and the moral culpability of the appellant. It was also within the range indicated by the case law. The Crown's sentence appeal was accordingly dismissed.

IV. Issues

153

1. Did the Court of Appeal err in upholding the decision of the learned trial judge to refuse to leave the "defence" of non-insane automatism to the jury?

2. Did the Court of Appeal err in holding that there was no miscarriage of justice when the defence report of Dr. Janke was ordered disclosed to the Crown?

3. (a) Did the Court of Appeal err in principle in deciding that the sentencing judge was entitled to consider provocation as a mitigating factor for manslaughter where the same provocation, through the operation of s. 232 of the *Criminal Code* had already reduced the stigma and penalty of an intentional killing from murder to manslaughter?

(b) Did the Court of Appeal err in upholding a demonstrably unfit sentence that failed to reflect the gravity of the offence properly and the moral culpability of the offender?

V. Relevant Statutory Provisions

154

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

16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing it was wrong.

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue.

232. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.

(3) For the purposes of this section, the questions

(*a*) whether a particular wrongful act or insult amounted to provocation, and

(*b*) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

(*a*) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or

(*b*) dismiss the appeal.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

. . . . .

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or child...

shall be deemed to be aggravating circumstances;

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

. . . . .

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

VI. Analysis

1. Did the Court of Appeal err in upholding the decision of the learned trial judge to refuse to leave the "defence" of non-insane automatism to the jury?

A. The Nature of Automatism

155 The legal term "automatism" has been defined on many occasions by many courts. In *Rabey*, *supra*, Ritchie J., speaking for the majority of this Court, at p. 518, adopted the following definition of the Ontario High Court of Justice in *R. v. K.* (1970), 3 C.C.C. (2d) 84 (Ont. H.C.), at p. 84:

> Automatism is a term used to describe unconscious, involuntary behaviour, the state of a person who, though capable of action is not conscious of what he is doing. It means an unconscious involuntary act where the mind does not go with what is being done.

156 The reference to unconsciousness in the definition of automatism has been the source of some criticism. In her article "Automatism and Criminal Responsibility" (1982-83), 25 *Crim. L.Q.* 95, W. H. Holland points out that this reference to unconsciousness reveals that the law assumes that a person is necessarily either conscious or unconscious. However, the medical literature speaks of different levels of consciousness (p. 96). Indeed, the expert evidence in the present case reveals that medically speaking, unconscious means "flat on the floor", that is, in a comatose-type state. I therefore prefer to define automatism as a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action.

157 Two forms of automatism are recognized at law: insane automatism and non-insane automatism. Involuntary action which does not stem from a disease of the mind gives rise to a claim of non-insane automatism. If successful, a claim of non-insane automatism entitles the accused to an acquittal. In *Parks*, *supra*, La Forest J. cited with approval, at p. 896, the following words of Dickson J. speaking in dissent in *Rabey*, *supra*, at p. 522:

> Although the word "automatism" made its way but lately to the legal stage, it is basic principle that absence of volition in respect of the act involved is always a defence to a crime. A defence that the act is involuntary entitles the accused to a complete and unqualified acquittal. That the defence of automatism exists as a middle ground between criminal responsibility and legal insanity is beyond question.

158 On the other hand, involuntary action which is found, at law, to result from a disease of the mind gives rise to a claim of insane automatism. It has long been recognized that insane automatism is subsumed by the defence of mental disorder, formerly referred to as the defence of insanity. For example, in *Rabey*, *supra*, Ritchie J. adopted the reasoning of Martin J.A. of the Ontario Court of Appeal. In *R. v. Rabey* (1977), 17 O.R. (2d) 1 (Ont. C.A.), Martin J.A. stated, at p. 12:

> Automatism caused by disease of the mind is subsumed under the defence of insanity leading to the special verdict of not guilty on account of insanity, whereas automatism not resulting from disease of the mind leads to an absolute acquittal....

159 Likewise, in dissent in *Rabey* (S.C.C.), Dickson J. noted, at p. 524:

> Automatism may be subsumed in the defence of insanity in cases in which the unconscious action of an accused can be traced to, or rooted in, a disease of the mind. Where that is so, the defence of insanity prevails.

160 More recently, in *Parks*, *supra*, La Forest J. confirmed that insane automatism falls within the scope of the defence of mental disorder as set out in s. 16 of the *Code* when he noted that where automatism stems from a disease of the mind, the accused is entitled to a verdict of insanity rather than an acquittal (p. 896). See also *R. v. Chaulk*, [1990] 3 S.C.R. 1303 (S.C.C.), at p. 1321. This classification is consistent with the wording of s. 16, which makes no distinction between voluntary and involuntary acts. Furthermore, the inclusion of mental disorder automatism within the ambit of s. 16 provides courts with an appropriate framework for protecting the public from offenders whose involuntarily criminal acts are rooted in diseases of the mind. Courts in other commonwealth countries have also recognized that insane automatism is subsumed by the defence of mental disorder or insanity. See for example *Bratty v. Attorney-General for Northern Ireland* (1961), [1963] A.C. 386 (U.K. H.L.), at pp. 410 and 414; *R. v. Falconer* (1990), 50 A. Crim. R. 244 (Australia H.C.), at pp. 255-56, 265 and 273-74; *R. v. Cottle*, [1958] N.Z.L.R. 999, at p. 1007.

161 Accordingly, a successful claim of insane automatism will trigger s. 16 of the *Code* and result in a verdict of not criminally responsible on account of mental disorder. Thus, although courts to date have spoken of insane" automatism" and non-insane "automatism" for purposes of consistency, it is important to recognize that in actuality true" automatism" only includes involuntary behaviour which does not stem from a disease of the mind. Involuntary behaviour which results from a disease of the mind is more correctly labelled a s. 16 mental disorder rather than insane automatism. For purposes of consistency, I will continue to refer to both as "automatism". However, I believe the terms "mental disorder" automatism and "non-mental disorder" automatism rather than "insane" automatism and "non-insane" automatism more accurately reflect the recent changes to s. 16 of the *Code*, and the addition of Part XX.1 of the *Code*.

B. Establishing a Single Approach to all Cases Involving Claims of Automatism

162 Automatism may arise in different contexts. For example, in *Parks*, *supra*, this Court dealt with a claim of automatism attributed to a state of somnambulism. In *R. c. Daviault*, [1994] 3 S.C.R. 63 (S.C.C.), this Court addressed extreme intoxication akin to a state of automatism. In the present case, the appellant claims that nothing more than his wife's words caused him to enter an automatistic state. This type of claim has become known as "psychological blow" automatism. Automatism attributed to a psychological blow was at the centre of this Court's decision in *Rabey*, *supra*.

163 The application of different legal tests for automatism dependent on the context in which the alleged automatism arose is a problem because there may be cases in which the facts simply are not conducive to such strict categorization. Cases involving disputes over the cause of the alleged automatism come to mind. The solution to this problem is, of course, to develop a general test applicable to all cases involving claims of automatism. This I will do in these reasons. I therefore emphasize that the following analysis is meant to apply to all claims of automatism and not simply to cases of "psychological blow" automatism. In my opinion, the most effective general test will incorporate various elements of this Court's most recent statements on automatistic-like behaviour; see *Daviault, Parks* and *Rabey*.

164 In *Parks*, *supra*, La Forest J. set out two discrete tasks which trial judges must undertake in determining whether automatism should be left with the trier of fact. First, he or she must assess whether a proper foundation

for a defence of automatism has been established. As I will explain below, establishing a proper foundation for automatism is the equivalent of satisfying the evidentiary burden for this defence. The mere assertion of involuntariness will not suffice. If a proper evidentiary foundation has been established, the trial judge must next determine whether the condition alleged by the accused is mental disorder or non-mental disorder automatism (p. 897).

165 In my opinion, the functionality of such a two-step framework is apparent and warrants making such an approach generally applicable to all cases involving claims of automatism. However, this framework only provides a starting point from which to develop a general legal approach to automatism. I will now clarify the particulars of the legal analysis which must be undertaken at each of the framework's two stages.

C. Step 1: Establishing a Proper Foundation for a Defence of Automatism

166 A review of the case law reveals that courts, including this Court, have provided little guidance about exactly what an accused must do to establish a proper foundation for a defence of automatism. Frequently, this stage of the judicial two-step analysis consists of nothing more than a remark that there is sufficient evidence on the record. By far the majority of judicial attention has concentrated on the second stage of the automatism analysis, that is, whether the defence of mental disorder or non-mental disorder automatism should be left with the trier of fact. In my opinion, this Court must provide trial judges with more detail about the required elements of a proper foundation for a defence of automatism. First, however, it is necessary to review how the proper foundation requirement fits into the general structure of our criminal law.

167 As mentioned above, establishing a proper foundation for automatism is the equivalent of satisfying the evidentiary burden for this defence. In *The Law of Evidence in Canada* (1992), J. Sopinka, S. Lederman and A. Bryant distinguish the evidentiary burden from the legal burden as follows, at p. 53:

> The term "burden of proof" is used to describe two distinct concepts relating to the obligation of a party to a proceeding in connection with the proof of a case. In its first sense, the term refers to the obligation imposed on a party to prove or disprove a fact or issue. In the second sense, it refers to a party's obligation to adduce evidence satisfactorily to the judge, in order to raise an issue.

168 The first sense of the term "burden of proof" suggested by Sopinka, Lederman and Bryant is referred to as the legal or ultimate burden, while the second is known as the evidentiary burden (p. 54). The first, or proper foundation, stage of the automatism analysis sets out what an accused must do to satisfy the evidentiary burden for automatism. As I will discuss below, this burden is directly related to the nature of the legal burden connected with automatism. Whether the accused has satisfied its evidentiary burden is a question of mixed law and fact for the trial judge. It should be noted that, until recently, this determination was considered to be a question of law; see *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at paras. 35 and 36. In determining whether the evidentiary burden has been satisfied, the trial judge must assess the evidence before the court. According to Viscount Kilmuir in *Bratty*, *supra*, at p. 406:

> ...for a defence of automatism to be "genuinely raised in a genuine fashion", there must be evidence on which a jury could find that a state of automatism exists. By this I mean that the defence must be able to point to some evidence, whether it emanates from their own or the Crown's witnesses, from which the jury could reasonably infer that the accused acted in a state of automatism. Whether or not there is such evidence is a matter of law for the judge to decide.

1999 CarswellBC 1064, [1999] 2 S.C.R. 290, 24 C.R. (5th) 1, 239 N.R. 201, 63 C.R.R. (2d) 43, 173 D.L.R. (4th) 66, 134 C.C.C. (3d) 353, 123 B.C.A.C. 1, 201 W.A.C. 1, 1999 CarswellBC 1065, [1999] S.C.J. No. 27, REJB 1999-12568, J.E. 99-1128

D. Nature and Origin of the Burdens Applied in Cases Involving Claims of Automatism

169 This Court has stated on many occasions that it is a fundamental principle of criminal law that only voluntary actions will attract findings of guilt. See for example *Daviault*, *supra*, at pp. 74-75, *per* Cory J.; *Rabey* (S.C.C.), *supra*, at pp. 522 and 545, *per* Dickson J.; *Parks* , *supra*, at p. 896, *per* La Forest J.; *Rabey* (Ont. C.A.), *supra, per* Martin J.A., at p. 24, adopted by Ritchie J. In *R. v. Théroux*, [1993] 2 S.C.R. 5 (S.C.C.), McLachlin J. classified voluntariness as the mental element of the *actus reus* of a crime (p. 17). In *Daviault*, Cory J. also recognized that voluntariness may be linked to the *actus reus* (p. 102). See also *Chaulk*, *supra*, at p. 1321, *per* Lamer C.J.

170 In *Parks*, *supra*, La Forest J. classified automatism as a sub-set of the voluntariness requirement, which he too recognized as part of the *actus reus* component of criminal responsibility (p. 896). I agree and would add that voluntariness, rather than consciousness, is the key legal element of automatistic behaviour since a defence of automatism amounts to a denial of the voluntariness component of the *actus reus*.

171 The law presumes that people act voluntarily. Accordingly, since a defence of automatism amounts to a claim that one's actions were not voluntary, the accused must rebut the presumption of voluntariness. An evidentiary burden is thereby imposed on the accused. The nature of this evidentiary burden stems from the legal burden imposed in cases involving claims of automatism. Generally, the legal burden in such cases has been on the Crown to prove voluntariness, a component of the *actus reus*, beyond a reasonable doubt — hence Dickson J.'s contention in *Rabey* that an accused claiming automatism need only raise evidence sufficient to permit a properly instructed jury to find a reasonable doubt as to voluntariness in order to rebut the presumption of voluntariness. The Crown then has the legal burden of proving voluntariness beyond a reasonable doubt to the trier of fact. If the Crown fails to satisfy this burden, the accused will be acquitted.

172 My colleague, Justice Binnie, relies heavily on Dickson J.'s approach to the nature of the burdens in cases involving claims of automatism. I do not agree that the reasons of Dickson J. provide justification for the refusal to review the appropriateness of these burdens on their merits in the present appeal. Furthermore, I must respectfully disagree with my colleague regarding the treatment of Dickson J.'s views on this point by La Forest J. in *Parks* . I note that in *Parks* the appropriateness of the evidentiary burden on the defence at the proper foundation stage was not directly at issue before this Court. As a result, La Forest J. did not find it necessary to assess the precise nature of either of the burdens of proof as set out by Dickson J. in *Rabey*.

E. What Should the Burdens of Proof Associated with Automatism Be?

173 The relationship between the burdens associated with automatism dictates that any change in the legal burden of automatism will necessarily result in a change to the evidentiary or proper foundation burden associated with this defence. The evidentiary burden will relate either to evidence sufficient to establish voluntariness beyond a reasonable doubt, as suggested by Binnie J., or, as set out below, to evidence sufficient to establish involuntariness on a balance of probabilities. In my opinion, a review of the legal burden applicable in cases involving claims of automatism is in order. My colleague Binnie J. is of the view that this Court ought not review either the legal or the evidentiary burden set out in the dissenting reasons of Dickson J. in *Rabey*. In support of this position, Binnie J. argues that neither the respondent nor any of the intervening Attorneys General requested such a review. With respect, I disagree. In its written submissions, the respondent invited this Court to reconsider the trial judge's finding that there was a proper foundation for automatism. The respondent also requested that this Court make the proper foundation stage of the automatism analysis more stringent. As explained

above, an assessment of an evidentiary or proper foundation burden cannot be undertaken without reference to the related legal burden.

174 In her 1993 *Proposals to amend the Criminal Code (general principles)*, the Minister of Justice recommended that the legal burden of proof in all cases of automatism be on the party that raises the issue on a balance of probabilities. This is the same legal burden that this Court applied to a claim of extreme intoxication akin to a state of automatism in *Daviault*, *supra*. It is also the legal burden Parliament assigned to the defence of mental disorder in s. 16 of the *Code*, which, as mentioned above, is equally applicable to voluntary and involuntary actions stemming from a disease of the mind and therefore applies to mental disorder automatism. As I explained above, different legal approaches to claims of automatism, whether based on the context in which the alleged automatism arose or on the distinction between mental disorder and non-mental disorder automatism, is problematic and should be avoided. Indeed, counsel for the appellant in the present case recognized as much in oral argument before this Court:

> No, I think that the — the conflict arises in a slightly different situation, which I'm going to come to in a moment, and that is that, when one deals with insanity, the evidentiary burden is upon the accused to establish that on the balance of probabilities.
>
> When one comes now, pursuant to this Court's decision in *Daviault*, to drunkenness akin to automatism, again, the onus is upon the accused, and the evidentiary burden as well.
>
> Whereas in non-insane automatism, the onus simply is upon the defence to raise it and for the Crown to then disprove it beyond a reasonable doubt in essence.
>
> So that is where I concede that there is a contradiction and that there may be some merit in having the same test and the same process applied to each of the different kinds of mental disorder, to use the term loosely.

175 An appropriate legal burden applicable to all cases involving claims of automatism must reflect the policy concerns which surround claims of automatism. The words of Schroeder J.A. in *R. v. Szymusiak*, [1972] 3 O.R. 602 (Ont. C.A.), at p. 608, come to mind:

> ... a defence which in a true and proper case may be the only one open to an honest man, but it may just as readily be the last refuge of a scoundrel.

176 The recognition that policy considerations are relevant is nothing new to this area of criminal law. In *Rabey* (Ont. C.A.), *supra*, Martin J.A., whose reasons were adopted by the majority of this Court, recognized that the term "disease of the mind" contains both a medical component and legal or policy component (p. 425). Dickson J., dissenting in *Rabey* (S.C.C.), noted, at p. 546, that specific policy considerations were involved in determining whether a claim of automatism should be categorized as mental disorder or non-mental disorder:

> There are undoubtedly policy considerations to be considered. Automatism as a defence is easily feigned. It is said the credibility of our criminal justice system will be severely strained if a person who has committed a violent act is allowed an absolute acquittal on a plea of automatism arising from a psychological blow. The argument is made that the success of the defence depends upon the semantic ability of psychiatrists, tracing a narrow path between the twin shoals of criminal responsibility and an insanity verdict. Added to these concerns is the *in terrorem* argument that the floodgates will be raised if psychological blow automatism is recognized in law.

177 Likewise, in *Parks*, *supra*, La Forest J. considered policy to be a relevant consideration for trial judges in distinguishing between mental disorder and non-mental disorder automatism (p. 896 and pp. 907-908).

178 In both *Rabey* and *Parks*, policy considerations were relegated to the second stage of the automatism analysis to determine whether the condition alleged by the accused was mental disorder or non-mental disorder automatism. In neither case is there any indication that this Court intended to preclude the consideration of policy in the determination of an appropriate legal burden for cases involving claims of automatism.

179 The foregoing leads me to the conclusion that the legal burden in cases involving claims of automatism must be on the defence to prove involuntariness on a balance of probabilities to the trier of fact. This is the same burden supported by Lord Goddard, dissenting in *Hill v. Baxter* (1957), [1958] 1 Q.B. 277 (Eng. Q.B.), at pp. 282-83, and imposed in some American jurisdictions; see for example *State v. Caddell*, 215 S.E.2d 348 (N.C. 1975); *Fulcher v. State*, 633 P.2d 142 (Wyo. 1981); *Polston v. State*, 685 P.2d 1 (Wyo. 1984); *State v. Fields*, 376 S.E.2d 740 (N.C. 1989).

180 In *Chaulk*, *supra*, and *Daviault*, *supra*, this Court recognized that although placing a balance of probabilities burden on the defence with respect to an element of the offence constitutes a limitation of an accused person's rights under s. 11(*d*) of the *Charter*, it can be justified under s. 1. In my opinion, the burden is also justified in the present case. The law presumes that people act voluntarily in order to avoid placing the onerous burden of proving voluntariness beyond a reasonable doubt on the Crown. Like extreme drunkenness akin to automatism, genuine cases of automatism will be extremely rare. However, because automatism is easily feigned and all knowledge of its occurrence rests with the accused, putting a legal burden on the accused to prove involuntariness on a balance of probabilities is necessary to further the objective behind the presumption of voluntariness. In contrast, saddling the Crown with the legal burden of proving voluntariness beyond a reasonable doubt actually defeats the purpose of the presumption of voluntariness. Thus, requiring that an accused bear the legal burden of proving involuntariness on a balance of probabilities is justified under s. 1. There is therefore no violation of the Constitution. On this latter point, I would note the words of Lamer C.J. in *R. v. Swain*, [1991] 1 S.C.R. 933 (S.C.C.), at pp. 996-97:

> I also wish to point out that, throughout my reasons on this issue, I have been careful to speak of the old common law rule as limiting the s. 7 *Charter* right and as violating the Constitution only after having reached the conclusion that the limitation is not justified under s. 1 of the *Charter*. This choice of language is deliberate but does not depend on the fact that this case involves a *Charter* challenge to a common law rule as opposed to a legislative provision. Whether one is speaking of a legislative provision or a common law rule it is not, in my view, correct to speak of a law violating a particular provision of the *Charter* (such as s. 7) prior to having gone through a s. 1 analysis. The *Charter* guarantees the particular rights and freedoms set out in it subject to reasonable limits which can be, under s. 1, demonstrably justified in a free and democratic society. Thus a law which limits a right set out in the *Charter* will only violate the Constitution if it is not justified under s. 1. In this instance, the law will either be struck down (to the extent of the inconsistency) under s. 52(1) or it will be reinterpreted so as not to violate the Constitution. If a law which limits a right set out in the *Charter* is justified under s. 1, that law does not violate the Constitution.

181 One final point on the issue of justification. My colleague Binnie J. distinguishes the s. 1 analysis in the present case from that in *Daviault* on the basis of the state of the law prior to a change established by this Court. With respect, I cannot agree that the issue of whether the previous state of the law was more or less advantageous to the accused is relevant to the justification of subsequent law. In both instances, the relevant matter is

whether an *existing* infringement can be justified as a reasonable limit in a free and democratic society. The relevant subject of the s. 1 analysis is therefore the *current* state of the law rather than the comparative nature of previous law.

182 As explained above, what an accused must do to satisfy the evidentiary or proper foundation burden in cases involving claims of automatism is directly related to the nature of the legal burden in such cases. Accordingly, a change to the evidentiary burden associated with automatism is in order. To meet this burden, the defence must satisfy the trial judge that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. In my opinion, this evidentiary burden is consistent with the two-step approach taken by La Forest J. in *Parks*, *supra*. As noted above, the appropriateness of the evidentiary burden on the defence at the proper foundation stage was not directly at issue before this Court in *Parks*. This explains why La Forest J. did not find it necessary to refine the burdens associated with automatism to the extent that it has been necessary for me to do in the present case. What then is the nature of the evidence which will be required to satisfy this revised proper foundation or evidentiary burden?

183 A review of the case law reveals that an accused must claim that he acted involuntarily at the relevant time in order to satisfy the automatism evidentiary burden. As stated earlier, a mere assertion of involuntariness will not suffice. See for example *Bratty*, *supra*, at pp. 406 and 413-14; *Rabey* (Ont. C.A.), *supra*, at pp. 24-25, *per* Martin J.A. adopted by Ritchie J; *Parks*, *supra*, at p. 897, *per* La Forest J.; *Falconer*, *supra*, at pp. 250-51 and 266.

184 In addition to an assertion of involuntariness, the defence must present expert psychiatric evidence confirming its claim. See for example *Bratty*, *supra*, at p. 413; *Falconer*, *supra*, at pp. 250-57 and 266; *Daviault*, *supra*, at pp. 101 and 103; *Rabey* (S.C.C.), *supra*, at p. 552, *per* Dickson J. Even the appellant in the present case concedes that in the absence of such psychiatric evidence it is unlikely that he could satisfy his evidentiary or proper foundation burden.

185 The law often requires judges to make subtle and sophisticated determinations about scientific methodology and expert evidence. Cases involving claims of automatism are no exception. Yet as Breyer J. of the United States Supreme Court aptly recognized in *General Electric Co. v. Joiner*, 118 S. Ct. 512 (U.S. Ga. 1997), judges are usually not scientists and thus do not have the scientific training which facilitates the making of such decisions. For this reason, when law and science intersect, judges must undertake their duties with special care (p. 520).

186 Although cases involving claims of automatism do not deal with complex chemical reactions or the like, they do require judges to assess confusing and often contradictory psychiatric evidence. In particular, when determining whether the evidentiary burden for automatism has been satisfied, trial judges must be careful to recognize that the weight to be given to expert evidence may vary from case to case. If the expert testimony establishes a documented history of automatistic-like dissociative states, it must be given more weight than if the expert is simply confirming that the claim of automatism is plausible. In the former case, the expert is actually providing a medical opinion about the accused. In the latter case, however, the expert is simply providing an opinion about the circumstances surrounding the allegation of automatism as they have been told to him or her by the accused. Trial judges must keep in mind that an expert opinion of this latter type is entirely dependent on the accuracy and truthfulness of the account of events given to the expert by the accused. Indeed, in the present case, Dr. Janke, the defence psychiatrist, qualified his opinion by noting that it was based almost exclusively on the accuracy and truthfulness of the appellant's account of events:

> I think that, that when, in offering the [expert psychiatric] opinion, it is, in this circumstance, it's contingent upon the person being accurate in representing what they recall from that event. There are circumstances where you do have other witnesses who can give you some supportive evidence, but in this situation, you have to rely on a person. If they're not telling the truth, then the opinion is worthless.

187 In order to satisfy the evidentiary or proper foundation burden, all cases will require an assertion of involuntariness and confirming psychiatric evidence. However, this burden will generally require more than an assertion of involuntariness on the part of the accused accompanied by confirming expert evidence that automatism is plausible assuming the account of events given to the expert by the accused was accurate and truthful. The recognition of Sopinka, Lederman and Bryant in *The Law of Evidence in Canada, supra*, at p. 129, that "[p]olicy considerations are important in determining the sufficiency of evidence that is required to satisfy [evidential burdens] in both criminal and civil proceedings" supports such an approach. I will now attempt to provide some guidance on what additional evidence is relevant to the determination of whether the defence has raised evidence which would permit a properly instructed jury to find that the accused acted involuntarily on a balance of probabilities. The factors discussed here are given only by way of example and are meant to illustrate the type of reasoning trial judges should employ when evaluating the evidence adduced at trial.

188 Both the majority and dissent of this Court in *Rabey, supra*, recognized that a" shocking" psychological blow was required before non-mental disorder, rather than mental disorder, automatism could be left with the trier of fact. Although *Rabey* dealt specifically with "psychological blow" automatism, I am of the opinion that it is appropriate in all cases for trial judges to consider the nature of the alleged automatism trigger in order to assess whether the defence has raised evidence on which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. With reference to psychological blow automatism specifically, I agree that the defence will generally have to provide evidence of a trigger equivalent to a" shock" in order to satisfy its evidentiary burden.

189 The existence or non-existence of evidence which corroborates the accused's claim of automatism will also be relevant to the assessment of whether a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. Such evidence may take different forms. Two examples are worth noting here. First, evidence of a documented medical history of automatistic-like dissociative states would certainly assist the defence in satisfying a trial judge that a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. Furthermore, the more similar the historical pattern of dissociation is with the current claim of automatism, the more persuasive the evidence will be on the issue of involuntariness. For example, a documented history of dissociation in response to the particular triggering stimuli in question in the case could serve as strong evidence that the same stimuli once again triggered an involuntary response. Although I would not go so far as to make a medical history of dissociation a requirement for the defence to meet its evidentiary burden at the proper foundation stage, I would note that the lack of such evidence is also a relevant factor in determining whether this defence burden has been satisfied.

190 Corroborating evidence of a bystander which reveals that the accused appeared uncharacteristically glassy-eyed, unresponsive and or distant immediately before, during or after the alleged involuntary act will also be relevant to the assessment of whether the defence has raised evidence on which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. This is confirmed by the expert evidence of Dr. Murphy, the Crown psychiatrist in the present case, as set out above. Indeed, the fact that it is common practice for judges to note specifically witness' comments about the appearance of the accused at the relevant time indicates that this may already be a factor weighed in the assessment of whether or not the defence

has satisfied its evidentiary burden in cases involving claims of automatism. I would caution, however, that the evidence of bystanders must be approached very carefully since automatism and rage may often be indistinguishable to untrained bystanders.

191 Another factor which trial judges should consider in assessing whether the defence has raised evidence which would permit a properly instructed jury to find that the accused acted involuntarily on a balance of probabilities is motive. A motiveless act will generally lend plausibility to an accused's claim of involuntariness. Indeed, in the present case, Dr. Murphy, the Crown psychiatrist, testified that since the mind and body of a person in a dissociative state have been split, she would expect that there would usually be no connection between involuntary acts done in a state of automatism and the social context immediately preceding them. Dr. Murphy also noted that if a single person is both the trigger of the alleged automatism and the victim of the automatistic violence, the claim of involuntariness should be considered suspect. I agree that the plausibility of a claim of automatism will be reduced if the accused had a motive to commit the crime in question or if the "trigger" of the alleged automatism is also the victim. On the other hand, if the involuntary act is random and lacks motive, the plausibility of the claim of automatism will be increased. A question that trial judges should ask in assessing whether the defence has raised evidence which would permit a properly instructed jury to find that the accused acted involuntarily on a balance of probabilities is therefore whether or not the crime in question is explicable without reference to the alleged automatism. If this question can be answered in the negative, the plausibility of the accused's claim of involuntariness will be heightened. Such was the case in *Parks*, *supra*, for example, where there was no explanation for why the accused would attack his" in-laws", with whom he otherwise had a good relationship, except automatism induced by a state of somnambulism. In contrast, if this question invokes a positive response, the plausibility of the claim of involuntariness will be decreased.

192 To sum up, in order to satisfy the evidentiary or proper foundation burden in cases involving claims of automatism, the defence must make an assertion of involuntariness and call expert psychiatric or psychological evidence confirming that assertion. However, it is an error of law to conclude that this defence burden has been satisfied simply because the defence has met these two requirements. The burden will only be met where the trial judge concludes that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. In reaching this conclusion, the trial judge will first examine the psychiatric or psychological evidence and inquire into the foundation and nature of the expert opinion. The trial judge will also examine all other available evidence, if any. Relevant factors are not a closed category and may, by way of example, include: the severity of the triggering stimulus, corroborating evidence of bystanders, corroborating medical history of automatistic-like dissociative states, whether there is evidence of a motive for the crime, and whether the alleged trigger of the automatism is also the victim of the automatistic violence. I point out that no single factor is meant to be determinative. Indeed, there may be cases in which the psychiatric or psychological evidence goes beyond simply corroborating the accused's version of events, for example, where it establishes a documented history of automatistic-like dissociative states. Furthermore, the ever advancing state of medical knowledge may lead to a finding that other types of evidence are also indicative of involuntariness. I leave it to the discretion and experience of trial judges to weigh all of the evidence available on a case by case basis and to determine whether a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities.

F. Step 2: Determining Whether to Leave Mental Disorder or Non-Mental Disorder Automatism with the Trier of Fact

193 Only if the accused has laid a proper foundation for a defence of automatism will it be necessary for the

trial judge to determine whether mental disorder or non-mental disorder automatism should be left with the trier of fact. If the trial judge concludes that a proper foundation has not been established, the presumption of voluntariness will be effective and neither automatism defence will be available to the trier of fact. In such a case, however, the accused may still claim an independent s. 16 defence of mental disorder.

194 The determination of whether mental disorder or non-mental disorder automatism should be left with the trier of fact must be undertaken very carefully since it will have serious ramifications for both the individual accused and society in general. As mentioned above, mental disorder automatism is subsumed by the defence of mental disorder as set out in the *Code*. Accordingly, a successful defence of mental disorder automatism will result in a verdict of not criminally responsible on account of mental disorder as dictated by s. 672.34 of the *Code*. Under s. 672.54, an accused who receives this qualified acquittal may be discharged absolutely, discharged conditionally or detained in a hospital. In contrast, a successful defence of non-mental disorder automatism will always result in an absolute acquittal.

195 The assessment of which form of automatism should be left with the trier of fact comes down to the question of whether or not the condition alleged by the accused is a mental disorder. Mental disorder is a legal term. It is defined in s. 2 of the *Code* as "a disease of the mind". In *Parks*, *supra*, at pp. 898-99, the majority of this Court adopted the reasons of Martin J.A. in *Rabey* (Ont. C.A.), *supra*, which included the following explanation of the term" disease of the mind", at pp. 12-13:

> Although the term "disease of the mind" is not capable of precise definition, certain propositions may, I think, be asserted with respect to it. "Disease of the mind" is a legal term, not a medical term of art; although a legal concept, it contains a substantial medical component as well as a legal or policy component.
>
> . . . . .
>
> The evidence of medical witnesses with respect to the cause, nature and symptoms of the abnormal mental condition from which the accused is alleged to suffer, and how that condition is viewed and characterized from the medical point of view, is highly relevant to the judicial determination of whether such a condition is capable of constituting a "disease of the mind". The opinions of medical witnesses as to whether an abnormal mental state does or does not constitute a disease of the mind are not, however, determinative, since what is a disease of the mind is a legal question....

196 In *Rabey* (Ont. C.A.), Martin J.A. described the task of the trial judge in determining the disease of the mind issue as follows, at p. 13:

> I take the true principle to be this: It is for the Judge to determine what mental conditions are included within the term "disease of the mind", and whether there is any evidence that the accused suffered from an abnormal mental condition comprehended by that term.

197 Taken alone, the question of what mental conditions are included in the term disease of the mind is a question of law. However, the trial judge must also determine whether the condition the accused claims to have suffered from satisfies the legal test for disease of the mind. This involves an assessment of the particular evidence in the case rather than a general principle of law and is thus a question of mixed law and fact. See *Southam, supra*, at paras. 35 and 36. The question of whether the accused actually suffered from a disease of the mind is a question of fact to be determined by the trier of fact. See *Rabey* (S.C.C.), *supra*, at p. 519, *per* Ritchie J.; *Parks*, *supra*, at p. 897, *per* La Forest J.; and *Bratty*, *supra*, at p.412, *per* Lord Denning.

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198 In response to the above-mentioned proposed revisions to the *Code* regarding automatism, the Canadian Psychiatric Association submitted a Brief to the House of Commons Standing Committee on Justice and the Solicitor General. In this brief, the Association, on behalf of its 2,400 members nationwide, suggested that from a medical perspective, all automatism necessarily stems from mental disorder. Accordingly, the Association recommended that non-mental disorder automatism be eliminated and all claims of automatism be classified as mental disorders.

199 Since mental disorder is a legal term, the opinion of the Canadian Psychiatric Association, while relevant, is not determinative of whether two distinct forms of automatism, mental disorder and non-mental disorder, should continue to be recognized at law. In my opinion, this Court should not go so far as to eliminate the defence of non-mental disorder automatism as the Association suggests. However, I take judicial notice that it will only be in rare cases that automatism is not caused by mental disorder. Indeed, since the trial judge will have already concluded that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities, there is a serious question as to the existence of an operating mind by the time the disease of the mind issue is considered. The foregoing lends itself to a rule that trial judges start from the proposition that the condition the accused claims to have suffered from is a disease of the mind. They must then determine whether the evidence in the particular case takes the condition out of the disease of the mind category. This approach is consistent with this Court's decision in *Rabey*, *supra.*

200 In *Rabey*, this Court adopted the "internal cause theory" of Martin J.A. as the primary test for determining whether automatism resulting from a psychological blow stems from a disease of the mind. The following is a portion of Martin J.A.'s explanation of this approach, which was cited with approval by the majority of this Court, at p. 519:

> In general, the distinction to be drawn is between a malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional makeup, or in some organic pathology, as opposed to a malfunctioning of the mind, which is the transient effect produced by some specific external factor such as, for example, concussion. Any malfunctioning of the mind, or mental disorder having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not) may be a 'disease of the mind' if it prevents the accused from knowing what he is doing, but transient disturbances of consciousness due to certain specific external factors do not fall with the concept of disease of the mind.

201 It is clear from Martin J.A.'s reasons that the internal cause theory starts from the proposition that the condition the accused claims to have suffered from is a disease of the mind. At pp. 21-22, he states:

> The malfunctioning of the mind which the respondent suffered, although temporary, is a "disease of the mind", unless it can be considered as a transient state produced by an external cause within the meaning of the authorities.
>
> In my view, the ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a "disease of the mind". [Emphasis added.]

202 The reasons of La Forest J. in *Parks*, *supra*, are sometimes read as reversing the *Rabey* notion that the disease of the mind inquiry should begin from the proposition that the condition the accused claims to have suffered from is a disease of the mind. However, La Forest J. clearly stipulated, at p. 898, that" the approach to

distinguishing between insane and sane automatism was settled by this Court's judgement in *Rabey*" . Furthermore, in applying the second step of the automatism analysis, La Forest J. considered whether policy factors *precluded* a finding of non-mental disorder automatism (p. 908). In the end, given the fact specific approach taken by this Court in *Parks*, I would conclude that *Parks* cannot be interpreted as reversing *Rabey* on this issue.

G. Determining Whether the Condition the Accused Claims to Have Suffered from is a Disease of the Mind

203 In *Parks*, La Forest J. recognized that there are two distinct approaches to the disease of the mind inquiry: the internal cause theory and the continuing danger theory. He recognized the internal cause theory as the dominant approach in Canadian jurisprudence but concluded, at p. 902, that this theory "is really meant to be used only as an analytical tool, and not as an all-encompassing methodology". This conclusion stemmed from a finding that somnambulism, the alleged trigger of the automatism in *Parks* , raises unique problems which are not well-suited to analysis under the internal cause theory. I agree that the internal cause theory cannot be regarded as a universal classificatory scheme for "disease of the mind". There will be cases in which the approach is not helpful because, in the words of La Forest J., at p. 903, "the dichotomy between internal and external causes becomes blurred". Accordingly, a new approach to the disease of the mind inquiry is in order. As I will explain below, a more holistic approach, like that developed by La Forest J. in *Parks* , must be available to trial judges in dealing with the disease of the mind question. This approach must be informed by the internal cause theory, the continuing danger theory and the policy concerns raised in this Court's decisions in *Rabey* and *Parks*.

(1) The Internal Cause Theory

204 The internal cause theory was developed in the context of psychological blow automatism. Under the internal cause theory, the trial judge must compare the accused's automatistic reaction to the psychological blow to the way one would expect a normal person in the same circumstances to react in order to determine whether the condition the accused claims to have suffered from is a disease of the mind. As K. L. Campbell points out, at p. 354 of his article "Psychological Blow Automatism: A Narrow Defence" (1980-81), 23 *Crim. L. Q.* 342, how can abnormality be defined in any other way but by comparison to what is normal. The words of Martin J.A. in *Rabey* (Ont. C.A.), *supra*, adopted by the majority of this Court, at p. 520, highlight this comparative approach to the disease of the mind question:

> In my view, the ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a "disease of the mind".... I leave aside, until it becomes necessary to decide them, cases where a dissociative state has resulted from emotional shock without physical injury, resulting from such causes, for example, as being involved in a serious accident although no physical injury has resulted; being the victim of a murderous attack with an uplifted knife, notwithstanding that the victim has managed to escape physical injury; seeing a loved one murdered or seriously assaulted, and like situations. Such extraordinary external events might reasonably be presumed to affect the average normal person without reference to the subjective makeup of the person exposed to such experience.

205 The nature of the alleged trigger of the automatism is at the centre of the comparison the trial judge must undertake. For example, in the context of psychological blow automatism, both the majority and dissent of this Court in *Rabey* recognized that a "shocking" psychological blow was required before non-mental disorder, rather than mental disorder, automatism could be left with the trier of fact. To this end, the majority adopted the above-quoted words of Martin J.A. In dissent, Dickson J. made the following comment, at p. 549:

> I agree with the requirement that there be a shock precipitating the state of automatism. Dissociation caused by a low stress threshold and surrender to anxiety cannot fairly be said to result from a psychological blow.

206 Accordingly, in *Rabey*, this Court unanimously supported the notion that there is a comparative element to the disease of the mind inquiry which involves an assessment of the nature of the trigger of the alleged automatism. In effect, the trial judge must consider the nature of the trigger and determine whether a normal person in the same circumstances might have reacted to it by entering an automatistic state as the accused claims to have done. Although I recognize that this approach will not be helpful in all cases, I believe that it remains useful in others. As such, the internal cause approach is a factor for trial judges to consider in cases in which they deem it useful. It may be helpful to provide some guidance as to how the comparison involved in the internal cause theory should be undertaken. I will do so in the context of psychological blow automatism, as I believe the internal cause approach will be most useful in cases involving automatism claims of this nature.

207 In his article, *supra*, Campbell points out that in assessing triggers of psychological blow automatism in *Rabey*, the majority of this Court drew the line between stressful situations and extremely shocking events. Under this approach, a finding that an alleged condition is not a disease of the mind, and consequently can support a defence of non-mental disorder automatism, is limited to cases involving triggers that normal people would find extremely shocking. Involuntariness caused by any less severe shock or mere stress is presumed to be triggered by a factor internal to the accused and as such constitutes a disease of the mind which can only give rise to a defence of mental disorder automatism (p. 357). Dickson J., in dissent, drew the line between stressful situations and mildly shocking events. Under this approach, the threshold requirement for a finding that a condition is not a disease of the mind is any shock, no matter what its severity. Only events which cannot be classified as a shock of any degree are labelled as internal, and thus diseases of the mind which can only give rise to the defence of mental disorder automatism (p. 358).

208 Given that the present case involves psychological blow automatism, I believe it is appropriate to express my opinion that the position of the majority in *Rabey* on this issue is preferable. The point of undertaking the comparison is to determine whether a normal person might have reacted to the alleged trigger by entering an automatistic state as the accused claims to have done. In cases involving claims of psychological blow automatism, evidence of an extremely shocking trigger will be required to establish that a normal person might have reacted to the trigger by entering an automatistic state, as the accused claims to have done.

209 When undertaking a comparison with a normal person, one is immediately faced with the difficulty of determining the importance of the context in which the comparison is made. I agree with the following comments of the High Court of Australia in *Falconer*, *supra*, on this issue (at p. 264):

> In determining whether the mind of an ordinary person would have malfunctioned in the face of the physical or psychological trauma to which the accused was subjected, the psychotic, neurotic or emotional state of the accused at that time is immaterial. The ordinary person is assumed to be a person of normal temperament and self-control. Consequently, evidence that, in the week preceding the shooting, [the accused] had demonstrated fear, depression, emotional disturbance and an apparently changed personality would not have been relevant in determining the reaction of an ordinary person. Likewise, evidence of the stress that she suffered on discovering that her husband had sexually assaulted their two daughters would not have been relevant in determining the reaction of the ordinary person to the incidents which took place on the day of the shooting. But the evidence of the objective circumstances of the relationship between the parties would have been relevant to that issue, for only by considering the pertinent circumstances of that relationship

> could the jury determine whether an ordinary person would have succumbed to a state of dissociation similar to that which [the accused] claims overtook her on that day. Speaking generally, the issue for the jury on this aspect of the case would be whether an ordinary woman of [the accused]'s age and circumstances, who had been subjected to the history of violence which she alleged, who had recently discovered that her husband had sexually assaulted their daughters, who knew that criminal charges had been laid against her husband in respect of these matters and who were separated from her husband as a result of his relationship with another woman, would have entered a state of dissociation as the result of the incidents which occurred on the day of the shooting.

210 The comparison involved in the disease of the mind inquiry is thus a contextual objective test. The accused's automatistic reaction to the alleged trigger must be assessed from the perspective of a similarly situated individual. This requires that the circumstances of the case be taken into account. However, I emphasize that this is not a subjective test.

211 The appellant argues that the objective element of the internal cause theory violates ss. 7 and 11(*d*) of the *Charter*. According to the appellant, the *Charter* requires that the focus of the disease of the mind inquiry be on the actual, subjective response of the accused rather than that of a normal person. With respect, this argument fails to recognize that the objective inquiry into whether the condition claimed by the accused is a disease of the mind is applied only after a subjective inquiry into whether there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities has been completed by the trial judge. That is, the objective standard affects only the classification of the defence rather than the assessment of whether the *actus reus* of the offence has been established. A similar objective standard was applied to the defence of provocation in *R. v. Cameron* (1992), 71 C.C.C. (3d) 272 (Ont. C.A.), where the Ontario Court of Appeal held that the objective standard involved in the defence of provocation does not violate ss. 7 and 11(*d*) because it does not detract from the *mens rea* required to establish murder. The point I wish to make here is that the objective component of the internal cause theory does not affect the burden of proof on the issue of whether the accused voluntarily committed the offence. Moreover, the impact of the objective comparison is limited even with regard to the disease of the mind inquiry. As noted above, I agree with La Forest J. in *Parks* that the internal cause theory is only an analytical tool. It is not being held out as the definitive answer to the disease of the mind question. In each case, the trial judge must determine whether and to what extent the theory is useful given the facts of the case. Indeed, he or she has the discretion to disregard the theory if its application would not accord with the policy concerns which underlie the disease of the mind inquiry. In this way, the internal cause approach attempts to strike an appropriate balance between the objectives of providing an exemption from criminal liability for morally innocent offenders and protecting the public. In these circumstances, the objective component of the internal cause theory does not limit either s. 7 or s. 11(*d*) of the *Charter*. I would add that consideration of the subjective psychological make-up of the accused in the internal cause theory would frustrate the very purpose of making the comparison, which is of course to determine whether the accused was suffering from a disease of the mind in a legal sense.

(2) The Continuing Danger Theory

212 As mentioned above, both the majority and dissenting judges of this Court in *Rabey*, as well as La Forest J. in *Parks*, recognized that policy considerations are relevant to the determination of whether a claim of automatism is the result of a disease of the mind. One policy factor which is central to the disease of the mind inquiry is the need to ensure public safety. Indeed, as mentioned above, La Forest J. recognized in *Parks* that the second dominant approach to the disease of the mind question is the continuing danger theory. This theory holds

that any condition which is likely to present a recurring danger to the public should be treated as a disease of the mind. In other words, the likelihood of recurrence of violence is a factor to be considered in the disease of the mind inquiry. This approach must be qualified to recognize that while a continuing danger suggests a disease of the mind, a finding of no continuing danger does not preclude a finding of a disease of the mind. See *Rabey*, *supra*, at p. 15 (Ont. C.A.), *per* Martin J.A., and at pp. 533 and 551 (S.C.C.), *per* Dickson J.; *Parks*, *supra*, at p. 907, *per* La Forest J.

213 In my opinion, trial judges should continue to consider the continuing danger theory as a factor in the determination of whether a condition should be classified as a disease of the mind. However, I emphasize that the continuing danger factor should not be viewed as an alternative or mutually exclusive approach to the internal cause factor. Although different, both of these approaches are relevant factors in the disease of the mind inquiry. As such, in any given case, a trial judge may find one, the other or both of these approaches of assistance. To reflect this unified, holistic approach to the disease of the mind question, it is therefore more appropriate to refer to the internal cause factor and the continuing danger factor, rather than the internal cause theory and the continuing danger theory.

214 In examining the continuing danger factor, trial judges may consider any of the evidence before them in order to assess the likelihood of recurrence of violence. However, two issues will be particularly relevant to the continuing danger factor: the psychiatric history of the accused and the likelihood that the trigger alleged to have caused the automatistic episode will recur.

215 As noted above, the defence must present expert psychiatric evidence in order to establish a proper foundation for a defence of automatism. The weight to be given to such evidence at the foundation stage will depend upon whether it establishes a documented history of automatistic-like dissociative states or simply confirms that a claim of automatism is plausible provided that the account of events given to the expert by the accused was accurate and truthful. The same distinction is again relevant when assessing the continuing danger factor in order to determine whether the condition the accused claims to have suffered from is a disease of the mind. Psychiatric evidence which reveals a documented history of automatistic-like dissociative states suggests that the condition alleged by the accused is of a recurring nature and thus increases the likelihood that automatism will recur. The likelihood of recurrence of violence is in turn heightened by the fact that at least one of the accused's automatistic episodes involved violence. In such a case, the continuing danger factor indicates that the condition the accused claims to have suffered from is likely to be classified as a disease of the mind. I would note that the absence of a history of automatistic-like dissociative states in no way indicates that there will be no recurrence of violence. In such a case, the trial judge will have to determine the recurrence of violence issue through other methods, one of which may be an assessment of the likelihood of recurrence of the alleged trigger of the automatism.

216 In their Case Comment on *R. v. Parks* (1993), 72 *Can. Bar Rev.* 224, I. Grant and L. Spitz point out that in assessing the likelihood of recurrence of violence, courts have been asking the wrong question. Courts have been focussing on whether the accused is likely to exhibit violent behaviour if he or she were again to encounter the alleged trigger of the current automatistic episode. According to Grant and Spitz, a more appropriate question is simply whether the alleged trigger is likely to recur. Grant and Spitz reason that there is no way of accurately predicting whether actual violence will recur. Indeed the likelihood of the initial automatistic violence would generally have been remote and thus difficult to predict. In contrast, the likelihood of recurrence of the circumstances which are alleged to have given rise to the automatism is more easily predicted (see pp. 235-36).

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217 The logic of the reasoning of Grant and Spitz is difficult to deny. Indeed, it reveals that an assessment of the likelihood that the particular accused will again encounter the trigger alleged to have caused the current automatistic episode, or a similar one of at least equal severity, may assist a judge in assessing the continuing danger factor. The greater the anticipated frequency of the trigger in the accused's life, the greater the risk posed to the public and, consequently, the more likely it is that the condition alleged by the accused is a disease of the mind.

(3) Other Policy Factors

218 There may be cases in which consideration of the internal cause and continuing danger factors alone does not permit a conclusive answer to the disease of the mind question. Such will be the case, for example, where the internal cause factor is not helpful because it is impossible to classify the alleged cause of the automatism as internal or external, and the continuing danger factor is inconclusive because there is no continuing danger of violence. Accordingly, a holistic approach to disease of the mind must also permit trial judges to consider other policy concerns which underlie this inquiry. As mentioned above, in *Rabey* and *Parks*, this Court outlined some of the policy concerns which surround automatism. I have already referred to those specific policy concerns earlier in these reasons. I repeat that I do not view those policy concerns as a closed category. In any given automatism case, a trial judge may identify a policy factor which this Court has not expressly recognized. Any such valid policy concern can be considered by the trial judge in order to determine whether the condition the accused claims to have suffered from is a disease of the mind. In determining this issue, policy concerns assist trial judges in answering the fundamental question of mixed law and fact which is at the centre of the disease of the mind inquiry: whether society requires protection from the accused and, consequently, whether the accused should be subject to evaluation under the regime contained in Part XX.1 of the *Code*.

H. Available Defences Following the Determination of the Disease of the Mind Question

219 If the trial judge concludes that the condition the accused claims to have suffered from is not a disease of the mind, only the defence of non-mental disorder automatism will be left with the trier of fact as the trial judge will have already found that there is evidence upon which a properly instructed jury could find that the accused acted involuntarily on a balance of probabilities. The question for the trier of fact will then be whether the defence has proven that the accused acted involuntarily on a balance of probabilities. A positive answer to this question by the trier of fact will result in a successful defence of non-mental disorder automatism and, consequently, an absolute acquittal.

220 I would note that in his instructions to the jury on the voluntariness issue in cases of non-mental disorder automatism, the trial judge should begin by thoroughly reviewing the serious policy factors which surround automatism, including concerns about feignability and the repute of the administration of justice. It will also be helpful for the trial judge to refer specifically to evidence relevant to the issue of involuntariness, such as: the severity of the triggering stimulus, corroborating evidence of bystanders, corroborating medical history of automatistic-like dissociative states, whether there is evidence of a motive for the crime, and whether the alleged trigger of the automatism is also the victim of the automatistic violence.

221 On the other hand, if the trial judge concludes that the alleged condition is a disease of the mind, only mental disorder automatism will be left with the trier of fact. The case will then proceed like any other s. 16 case, leaving for the trier of fact the question of whether the defence has proven, on a balance of probabilities, that the accused suffered from a mental disorder which rendered him or her incapable of appreciating the nature

and quality of the act in question. As mentioned earlier, s. 16 provides a framework within which the protection of the public will be assured when mental disorder automatism is established.

222 The trier of fact's determination of whether an accused has made out a successful claim of mental disorder automatism will absorb the question of whether the accused in fact acted involuntarily. That is, if the trial judge concludes that the allegation of automatism, if genuine, could only have resulted from a disease of the mind, a finding that the accused was not suffering from a mental disorder by the trier of fact necessarily extinguishes the validity of the accused's claim of involuntariness. Viscount Kilmuir L.C. put it this way in *Bratty*, *supra*, at p. 403:

> Where the possibility of an unconscious act depends on, and only on, the existence of a defect of reason from disease of the mind within the M'Naughten Rules, a rejection by the jury of this defence of insanity necessarily implies that they reject the possibility.

See also *Bratty*, *supra*, at pp. 404, 415 and 417-18; and *Rabey* (Ont. C.A.), *supra*, at pp. 24-25, *per* Martin J.A.

I. Application to the Present Case

223 At trial, the appellant claimed both mental disorder and non-mental disorder automatism. The learned trial judge concluded that the appellant had established a proper foundation for a defence of automatism, but that only mental disorder automatism should be left with the jury. In coming to these conclusions, the trial judge did not have the benefit of these reasons to guide him. Nevertheless, this does not warrant allowing the appeal because, as I explain below, the approach taken by the trial judge did not impair the appellant's position.

224 In determining whether the appellant had established a proper foundation for a defence of automatism, the trial judge stated that there must be evidence of unconsciousness throughout the commission of the crime. As I have explained above, automatism is more properly defined as impaired consciousness, rather than unconsciousness. Furthermore, lack of voluntariness, rather than consciousness, is the key legal element of automatism. Accordingly, the trial judge should have concerned himself with assessing whether there was evidence that the appellant experienced a state of impaired consciousness in which he had no voluntary control over his actions rather than whether there was evidence that the appellant was unconscious throughout the commission of the crime. Obviously, unconsciousness as defined by the trial judge supposes involuntariness. However, his finding that there was evidence of unconsciousness throughout the commission of the crime may have been based on a misunderstanding of the nature of the evidentiary burden on the accused at the proper foundation stage.

225 In accordance with much of the jurisprudence at the time, the trial judge may have found that a proper foundation for automatism had been established because the defence had met an evidentiary burden which amounted to no more than the appellant's claim of involuntariness and confirming expert psychiatric evidence. There is no indication that he assessed whether the defence had raised evidence on which a properly instructed jury could find that the appellant acted involuntarily on a balance of probabilities. Likewise, there is no indication that the trial judge recognized the limited weight to be accorded to the psychiatric evidence in this case, which only served to confirm that the appellant's claim of automatism was plausible provided the account of events he provided to Dr. Janke was accurate and truthful. Nor did the trial judge discuss the relevance of motive or corroborating evidence on his conclusion that a proper foundation for automatism had been established.

226 Turning to the disease of the mind stage of the automatism analysis, I note that the evidence in this case raised *only one alleged cause* of automatism, Donna Stone's words. Based on this evidence, the trial judge found

that only mental disorder automatism should be left with the jury. This conclusion was based primarily on a finding that the present case is indistinguishable from *MacLeod*, *supra*. Such reliance on precedent fails to reveal what effect, if any, the internal cause factor, the continuing danger factor and other policy factors had on the decision to leave only mental disorder automatism with the jury. This is not in accordance with the holistic approach to the disease of the mind question set out in these reasons. However, the internal cause factor and the continuing danger factor, as well as the other policy factors set out in this Court's decisions in *Rabey* and *Parks* all support the trial judge's finding that the condition the appellant alleges to have suffered from is a disease of the mind in the legal sense. In particular, the trigger in this case was not, in the words of Martin J.A. quoted in this Court's decision in *Rabey*, at p. 520, "extraordinary external events" that would amount to an extreme shock or psychological blow that would cause a normal person, in the circumstances of the accused, to suffer a dissociation in the absence of a disease of the mind. Accordingly, I find that the trial judge nevertheless reached the correct result on the disease of the mind question. As previously noted, in such a case, only mental disorder automatism must be put to the jury. There is no reason to go beyond the facts of this case in applying the rules discussed above.

227 In the end, I must conclude that no substantial wrong or miscarriage of justice occurred in the present case. Even if I had found that the trial judge erred in applying the evidentiary burden at the proper foundation stage of the automatism analysis, this error could only have benefitted the appellant. Although the trial judge did not apply the holistic approach to disease of the mind established in these reasons, he reached the correct result on this issue. There is no reasonable possibility that the verdict would have been different had the errors not been made; see *R. v. Bevan*, [1993] 2 S.C.R. 599 (S.C.C.). I would therefore dismiss this ground of appeal.

2. Did the Court of Appeal err in holding that there was no miscarriage of justice when the defence report of Dr. Janke was ordered disclosed to the Crown?

228 I concur with the reasons of Binnie J. on this ground of appeal.

3.(a) Did the Court of Appeal err in principle in deciding that the sentencing judge was entitled to consider provocation as a mitigating factor for manslaughter where the same provocation, through the operation of s. 232 of the *Code* had already reduced the stigma and penalty of an intentional killing from murder to manslaughter?

(b) Did the Court of Appeal err in upholding a demonstrably unfit sentence that failed to reflect the gravity of the offence properly and the moral culpability of the offender?

J. Standard of Appellate Review of Sentencing

229 The Crown's appeal of the seven-year sentence imposed by the sentencing judge in the present case must be considered in light of this Court's jurisprudence surrounding the appropriate standard of appellate review of sentencing. Section 687(1) of the *Code* provides a statutory right of appeal of sentence. It reads:

687.(1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

(*a*) vary the sentence within the limits prescribed by law for the offence of which the accused was con-

victed; or

(*b*) dismiss the appeal.

230 In *Shropshire*, *supra*, this Court considered the standard of appellate review authorized by s. 687(1). Speaking for a unanimous Court, Iacobucci J. concluded, at pp. 249-50, that appellate courts do not have free reign to modify sentence orders simply because they would themselves have imposed a different sentence. Rather, variation of sentence should only be made if an appellate court is convinced that a sentence is "not fit" or" clearly unreasonable" (p. 249). This deferential standard of appellate review must be adhered to as long as the trial judge did not err in principle, fail to consider a relevant factor or overemphasize the appropriate factors. In *M.* (*C.A.*), *supra*, Lamer C.J., also speaking for the Court, confirmed this deferential standard of appellate review of sentences and noted at p. 567:

> For these reasons, consistent with the general standard of review we articulated in *Shropshire*, I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes. [Emphasis added.]

See also *R. v. M. (T.E.)*, [1997] 1 S.C.R. 948 (S.C.C.), at paras. 15-17.

231 With this standard of appellate review of sentencing in mind, I will now assess the Crown's arguments against the seven-year sentence imposed by the sentencing judge in the present case.

K. Error in Principle

(1) Provocation as a Mitigating Factor for Manslaughter

232 The Crown and intervening Attorney General for Ontario argue that the sentencing judge erred in principle when he considered provocation as a mitigating factor after s. 232 of the *Code* had reduced a verdict of murder to one of manslaughter. For ease of reference, I reproduce s. 232 here:

> **232.**(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
>
> (2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
>
> (3) For the purposes of this section, the questions
>
> (*a*) whether a particular wrongful act or insult amounted to provocation, and
>
> (*b*) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,
>
> are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

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(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

233 As explained by Fraser C.J. in *R. v. Laberge* (1995), 165 A.R. 375 (Alta. C.A.), even for impulsive killings, there are different degrees of moral culpability. This Court has recognized that the broad sentencing range for manslaughter set out in s. 236 of the *Code* accords with the principle that punishment must be meted out with regard to the moral culpability or blameworthiness of an offender; see *R. v. Martineau*, [1990] 2 S.C.R. 633 (S.C.C.), at p. 647, *per* Lamer C.J., and *R. v. Creighton*, [1993] 3 S.C.R. 3 (S.C.C.), at pp. 48-49, *per* McLachlin J.

234 In reaching a sentence which accurately reflects a particular offender's moral culpability, the sentencing judge must consider all of the circumstances of the offence, including whether it involved provocation. Indeed, I agree with Finch J.A. in the court below, that to ignore the defence of provocation accepted by the jury, and the evidence upon which that defence was based, would be to ignore probative evidence of an offender's mental state at the time of the killing.

235 In a case involving manslaughter pursuant to s. 232 of the *Code*, however, the Crown and Attorney General for Ontario argue that provocation should not be considered in sentencing because it has already reduced the legal character of the crime from murder to manslaughter. According to this argument, considering provocation at the sentencing stage in such a case would reduce the offender's moral culpability and thereby reduce his or her sentence. This would, it is argued, give the offender a "double benefit" for the provoked nature of the killing. The Crown relies primarily on Manitoba cases in which that province's Court of Appeal refused to consider intoxication and provocation as mitigating factors when those factors had already served to reduce convictions of murder to manslaughter; see, for example, *R. v. Campbell* (1991), 70 Man. R. (2d) 158 (Man. C.A.), and *R. v. Woermann* (1992), 81 Man. R. (2d) 255 (Man. C.A.).

236 The defence of provocation applies only to the offence of murder. Historically, this limited defence was meant to guard against the unfair application of the death penalty. Even though the death penalty is no longer used as a punishment for murder, there is continued need for the limited defence of provocation. Because both first and second degree murder carry a minimum sentence of life imprisonment under s. 235 of the *Code*, judges have no discretion to consider provocation as a mitigating factor in determining appropriate sentences for these offences. Section 232 remedies this problem. In cases involving provocation, s. 232 permits a verdict of murder to be reduced to one of manslaughter, for which there is no minimum penalty unless a firearm was used in the commission of the offence (s. 236). This in turn allows for the consideration of provocation in the assessment of the offender's moral culpability and hence in the determination of an appropriate sentence. It is Parliament that has chosen to accord special attention to provocation.

237 It follows that an accused does not gain a "double benefit" if provocation is considered in sentencing after a verdict of manslaughter has been rendered by operation of s. 232. Rather, s. 232 provides an accused with a single benefit which can be characterized as a reduction of a verdict of murder to one of manslaughter in order to allow for the consideration of the provoked nature of the killing in the determination of an appropriate sentence. Accordingly, to give s. 232 full effect, provocation must be considered in sentencing in cases where this section of the *Code* has been invoked. The sentencing judge was therefore correct in considering provocation as a mitigating factor in the present case. The argument that the provocation factor was spent because it had already served to reduce the legal character of the crime overlooks the purpose of s. 232 and therefore must fail.

1999 CarswellBC 1064, [1999] 2 S.C.R. 290, 24 C.R. (5th) 1, 239 N.R. 201, 63 C.R.R. (2d) 43, 173 D.L.R. (4th) 66, 134 C.C.C. (3d) 353, 123 B.C.A.C. 1, 201 W.A.C. 1, 1999 CarswellBC 1065, [1999] S.C.J. No. 27, REJB 1999-12568, J.E. 99-1128

(2) Failure to Consider Appropriate Factors

238 The Crown and Attorneys General of Canada and for Ontario argue that the seven-year sentence imposed by the trial judge in the present case fails to reflect society's current understanding and awareness of the problem of violence against women in general, and, in particular, domestic violence. More specifically, they argue that the sentencing judge erred in failing to recognize that killing a spouse is considered an aggravating factor in sentencing in accordance with s. 718.2(*a*)(ii) of the *Code*. Section 718.2(*a*)(ii) reads:

> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> (*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> . . . . .
>
> (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child...
>
> shall be deemed to be aggravating circumstances....

The Attorneys General of Canada and for Ontario request that this Court specifically recognize spousal killings as an aggravating factor in sentencing under s. 718.2(*a*)(ii).

239 It is incumbent on the judiciary to bring the law into harmony with prevailing social values. This is also true with regard to sentencing. To this end, in *M. (C.A.)*, *supra*, Lamer C.J. stated, at para. 81:

> The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.... Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*. [Emphasis in original.]

This Court's jurisprudence also indicates that the law must evolve to reflect changing social values regarding the status between men and women; see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (S.C.C.); *R. v. Lavallee*, [1990] 1 S.C.R. 852 (S.C.C.); *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.).

240 In *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872 (S.C.C.), this Court recognized the "historical trend of violence perpetrated by men against women" (p. 877). More specifically, in *Lavallee*, *supra*, at p. 872, the growing social awareness of the problem of domestic violence was recognized by this Court. In my opinion, these cases indicate that prevailing social values mandate that the moral responsibility of offenders be assessed in the context of equality between men and women in general, and spouses in particular. Clearly, spousal killings involve the breach of a socially recognized and valued trust and must be recognized as a serious aggravating factor under s. 718.2(*a*)(ii).

241 Turning to the present case, I would note that s. 718.2(*a*)(ii) of the *Code* did not come into force until

September 3, 1996, approximately nine months *after* sentencing occurred in this case. Given that the *Code* cannot be retroactively applied to the disadvantage of an accused, the sentencing judge's treatment of the spousal nature of the killing must be assessed in light of the common law treatment of this factor prior to the implementation of s. 718.2(*a*)(ii). In my opinion, there is ample authority for the proposition that courts considered a spousal connection between offender and victim to be an aggravating factor in sentencing at common law; see *R. v. Doyle* (1991), 108 N.S.R. (2d) 1 (N.S. C.A.); *R. v. Brown* (1992), 13 C.R. (4th) 346 (Alta. C.A.); *R. v. Pitkeathly* (1994), 29 C.R. (4th) 182 (Ont. C.A.); *R. v. Jackson* (1996), 106 C.C.C. (3d) 557 (Alta. C.A.); *R. v. Edwards* (1996), 28 O.R. (3d) 54 (Ont. C.A.) .

242 In the present case, the sentencing judge, Brenner J., had the benefit of also presiding over the trial of this matter. He could hardly have been unaware of the spousal relationship between the offender and the victim in this case. Furthermore, he heard the Crown's submissions on sentence, which specifically identified this offence as one of domestic violence. In its submissions, the Crown brought the alarming rate of domestic violence and need for general deterrence to the judge's attention. It also pointed out that women are particularly susceptible to being victims of domestic violence and that social concern surrounding this type of offence is growing. In his reasons for sentence, Brenner J. specifically identified the offence as one of domestic violence and noted that he viewed general deterrence as the principle concern in this sentencing. Furthermore, the two authorities he found most applicable, *Archibald*, *supra*, and *Eklund*, *supra*, both involved spousal manslaughter. In my opinion, the Crown has failed to establish that the sentencing judge did not properly consider the domestic nature of this offence in reaching his decision on sentence. This ground of appeal must therefore fail.

(3) Fitness of the Sentence

(a) Sentencing Range for Provoked, Spousal Manslaughter

243 The Crown and the intervening Attorneys General of Canada and for Ontario argue that the sentence in the present case is unfit because the trial judge relied on an inappropriate sentencing range established by the British Columbia Court of Appeal for provoked, spousal manslaughter in *Archibald*. In *Archibald*, McEachern C.J. stated, at p. 304:

> For this kind of manslaughter, the cases we have been given, and my own experience as a sentencing judge, persuade me the modern range is from suspended sentence to something less than eight years, although it is wrong to assume there is any precise range that will apply to every case.

244 One function of appellate courts is to minimize disparity of sentences in cases involving similar offences and similar offenders; see *M. (C.A.)*, *supra*, at para. 92, and *M. (T.E.)*, *supra*, at para. 16, *per* Sopinka J. In carrying out this function, appellate courts may fix ranges for particular categories of offences as guidelines for lower courts. However, in attempting to achieve uniformity, appellate courts must not interfere with sentencing judges' duty to consider all relevant circumstances in sentencing; see *M. (T.E.)*, *supra*, at para. 43, *per* Sopinka J.; and at para. 66, *per* McLachlin J. In *Archibald*, McEachern C.J. clearly stated, at p. 304, that it would be wrong to assume that there is any" precise range that will apply to every case". In my opinion, this qualification reveals that the Court of Appeal in *Archibald* correctly intended for trial judges to balance uniformity in sentencing with their duty to consider the circumstances of the particular case.

245 This Court's decision in *M. (T.E.)*, *supra*, highlights the need for clarity on the part of appellate courts in setting ranges for offences. More specifically, McLachlin J., in dissent, stated that appellate courts must clearly specify what categories of offences are meant to be covered by a starting point (para. 104). Although the

majority, *per* Sopinka J., did not expressly identify this need for clarity in the classification of offences, it did agree that appellate courts may set starting points as guides for lower courts. In my opinion, a clarity requirement must be read into this appellate court authority because such guides would not be useful without a clear description of the category created and the logic behind the starting point appropriate to it. The same need for clear direction applies to ranges set by appellate courts. However, in *Archibald*, McEachern C.J. simply refers, at p. 304, to "this kind of manslaughter". Furthermore, the "kind" of manslaughter McEachern C.J. was referring to is not discernable from the facts of the case. Both provocation and intoxication were left with the jury in *Archibald* . The jury returned a verdict of manslaughter, but did not specify which of these factors had influenced its verdict. As a result, the category of offences McEachern C.J. intended the above-mentioned range to apply to is unclear. Indeed, McEachern C.J. specifically noted in his reasons that the trial judge, without making a specific finding, expressed the view that the stronger likelihood was that the jury acted on drunkenness rather than provocation (p. 303). Accordingly, it cannot be said with any certainty that the range set out in *Archibald* is applicable to cases involving provoked, spousal manslaughter like the present appeal. It is therefore unnecessary to assess the reasonableness of that sentencing range in this case.

246 There being no applicable range set by the Court of Appeal, it is necessary to determine whether the sentence was influenced negatively by factors unrelated to recognized sentencing principles and whether all of the appropriate factors were considered. In this case, I must however first consider the argument of the Crown and the Attorney General for Ontario that "double counting" of provocation is responsible for driving sentencing ranges for cases involving provoked, spousal manslaughter into the lower end of the spectrum available for manslaughter, and that this resulted in an inadequate sentence.

247 The argument that "double counting" of provocation is responsible for the sentencing range in cases involving provoked, spousal manslaughter fails to recognize that provocation is just one factor to be considered in assessing what end of the manslaughter sentencing range is approached in the circumstances of a particular case. Personal characteristics of the offender, as well as other circumstances surrounding the offence, such as the manner and method by which it was carried out, must also be considered. The words of Fraser C.J. in *Laberge*, *supra*, at p. 382, are apposite:

> Therefore, the court must look not only at the physical characterization of the act itself, but must assess a range of other considerations. These include the choice of weapon used to effect the unlawful act, the degree of force the offender used in perpetrating the act, the extent of the victim's injuries, the degree of violence or brutality, the existence of any additional gratuitous violence, the degree of deliberation involved in the act, the extent to which the act reflected forethought of action or planning, the complexity of the act, what, if anything, provoked the act, the time taken to perpetrate the act and the element of chance involved in the resulting death.

248 It is clear that provocation is merely one of numerous factors which will be considered in the assessment of an appropriate sentence for manslaughter pursuant to s. 232. It therefore cannot be said that cases involving provocation will always involve findings of insignificant moral culpability or that low range sentences can be attributed solely to the provocation factor.

(b) Inadequate Sentence

249 The Crown's final argument is that the seven-year sentence imposed in the present case is simply inadequate and therefore clearly unreasonable. The Crown points to a number of aggravating factors in support of

this ground of appeal. It also argues that the sentencing judge made unreasonable findings of fact. While I may have been inclined to impose a slightly more onerous sentence given the nature of the offence committed, this is not a valid reason for this Court to interfere with the sentence. In my opinion, the Crown has failed to discharge its burden to demonstrate that the sentencing judge's assessment of the facts in this case and the relevant authorities was clearly unreasonable. This ground of appeal must therefore fail.

VII. Conclusions and Disposition

250 In the first appeal, I have concluded that no substantial wrong or miscarriage of justice occurred. I would therefore affirm the conviction and dismiss the appeal.

251 In the second appeal, I agree with the Court of Appeal that the sentencing judge was aware of the aggravating and mitigating factors in this case and considered the relevant sentencing principles in reaching the sentence he imposed. Consequently, I would dismiss the Crown's sentence appeal and affirm the sentence imposed by the sentencing judge.

Appeals dismissed.

Pourvois rejetés.

END OF DOCUMENT

TAB 11

2002 CarswellOnt 496, 58 O.R. (3d) 49, 37 C.C.L.I. (3d) 86, 18 C.P.C. (5th) 241, [2002] O.T.C. 109

Browne (Litigation Guardian of) v. Lavery

Laura May Browne by her Litigation Guardian Terry Browne, Terry Browne and Erin Browne, Plaintiffs and David Lavery, Primus Automotive Financial Services Canada Inc., and Ford Motor Company of Canada Limited and Ford Credit Canada Limited, Defendants

Ontario Superior Court of Justice

Ferguson J.

Heard: December 4, 2001
Judgment: February 11, 2002
Docket: 99-CV-169461

Counsel: *E. Kim*, for Plaintiffs

M. Chadwick, for Defendant, David Lavery

G. Bowden, for Defendant, Primus Automotive Financial Services Canada Inc.

Subject: Insurance; Evidence; Civil Practice and Procedure

Insurance --- Actions on policies — Practice and procedure — Discovery

Insurer retained E as expert — E provided insurer with report — Insurer also retained A Ltd. as expert — A Ltd. was provided with copy of E's report — Insurer produced A Ltd.'s report during discovery but refused to produce E's report on grounds it was protected by litigation privilege — Insurer permitted E to be interviewed by insured but did not call E as witness at trial — Insured brought motion to compel production of E's report — Motion granted — E's report was originally subject to litigation privilege — In interview, E provided information as to findings and conclusions of report — Since some information in report was disclosed, privilege for entire report was waived — Since insurer did not call E as witness, insurer was not required to produce report on basis that E was expert — Once A Ltd. was called as witness, insured was entitled to production of foundation of A Ltd.'s opinion — Expert report by one expert sent to another expert who will be called on to testify fell within scope of production — E's report, as part of A Ltd.'s "findings" under R. 31.06(3) of Rules of Civil Procedure, had to be produced — A Ltd. was silent as to whether and to what extent it was influenced by E's report — Insured was entitled to disclosure of information provided to A Ltd., even if not relied on — Production required at discovery rather than at trial to avoid potential delays — Rules of Civil Procedure, R.R.O. 1990, Reg.

194, R. 31.06(3).

Evidence --- Documentary evidence — Privilege as to documents — Expert report

Insurer retained E as expert — E provided insurer with report — Insurer also retained A Ltd. as expert — A Ltd. was provided with copy of E's report — Insurer produced A Ltd.'s report during discovery but refused to produce E's report on grounds it was protected by litigation privilege — Insurer permitted E to be interviewed by insured but did not call E as witness at trial — Insured brought motion to compel production of E's report — Motion granted — E's report was originally subject to litigation privilege — In interview, E provided information as to findings and conclusions of report — Since some information in report was disclosed, privilege for entire report was waived.

Evidence --- Opinion evidence — Expert evidence — Expert reports

Insurer retained E as expert — E provided insurer with report — Insurer also retained A Ltd. as expert — A Ltd. was provided with copy of E's report — Insurer produced A Ltd.'s report during discovery but refused to produce E's report on grounds it was protected by litigation privilege — Insurer permitted E to be interviewed by insured but did not call E as witness at trial — Insured brought motion to compel production of E's report — Motion granted — E's report was originally subject to litigation privilege — In interview, E provided information as to findings and conclusions of report — Since some information in report was disclosed, privilege for entire report was waived — Since insurer did not call E as witness, insurer was not required to produce report on basis that E was expert — Once A Ltd. was called as witness, insured was entitled to production of foundation of A Ltd.'s opinion — Expert report by one expert sent to another expert who will be called on to testify fell within scope of production — E's report, as part of A Ltd.'s "findings" under R. 31.06(3) of Rules of Civil Procedure, had to be produced — A Ltd. was silent as to whether and to what extent it was influenced by E's report — Insured was entitled to disclosure of information provided to A Ltd., even if not relied on — Production required at discovery rather than at trial to avoid potential delays — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 31.06(3).

Practice --- Discovery — Discovery of documents — Privileged document — Expert reports

Insurer retained E as expert — E provided insurer with report — Insurer also retained A Ltd. as expert — A Ltd. was provided with copy of E's report — Insurer produced A Ltd.'s report during discovery but refused to produce E's report on grounds it was protected by litigation privilege — Insurer permitted E to be interviewed by insured but did not call E as witness at trial — Insured brought motion to compel production of E's report — Motion granted — E's report was originally subject to litigation privilege — In interview, E provided information as to findings and conclusions of report — Since some information in report was disclosed, privilege for entire report was waived.

Cases considered by *Ferguson J.*:

Allen v. Oulahen, 10 O.R. (3d) 613, 1992 CarswellOnt 698 (Ont. Master) — referred to

Athabaska Airways Ltd. v. De Havilland Aircraft of Canada Ltd., 34 C.P.C. (2d) 298, 1988 CarswellOnt 534 (Ont. H.C.) — referred to

Award Developments (Ontario) Ltd. v. Novoco Enterprises Ltd., 10 O.R. (3d) 186, 1992 CarswellOnt 687

(Ont. Gen. Div.) — referred to

Bardossy v. Cameo Restaurant Ltd., 2000 CarswellOnt 2200 (Ont. S.C.J.) — referred to

Beausoleil v. Canadian General Insurance Co. (September 21, 1993), Doc. Barrie 7488/83, 1429/86 (Ont. Gen. Div.) — referred to

Beck v. La Haie, 38 C.P.C. (2d) 67, 1989 CarswellOnt 434 (Ont. Master) — referred to

Bell Canada v. Olympia & York Developments Ltd., 33 C.L.R. 258, 68 O.R. (2d) 103, 36 C.P.C. (2d) 193, 1989 CarswellOnt 402 (Ont. H.C.) — not followed

Binkle v. Lockhart, 24 C.P.C. (3d) 11, 1994 CarswellOnt 493 (Ont. Gen. Div.) — referred to

Bronstetter v. Davies, 11 C.P.C. (2d) 289, 1986 CarswellOnt 412 (Ont. H.C.) — referred to

Cacic v. O'Connor, 71 O.R. (2d) 751, 42 C.P.C. (2d) 266, 1990 CarswellOnt 358 (Ont. H.C.) — referred to

Calvaruso v. Nantais, 7 C.P.C. (3d) 254, 1992 CarswellOnt 447 (Ont. Gen. Div.) — referred to

Casey v. Orr, 1996 CarswellOnt 444 (Ont. Gen. Div.) — referred to

Cheaney v. Peel Memorial Hospital, 73 O.R. (2d) 794, 44 C.P.C. (2d) 158, 1990 CarswellOnt 380 (Ont. Master) — referred to

General Accident Assurance Co. v. Chrusz, 1997 CarswellOnt 4360, 48 C.C.L.I. (2d) 207, 17 C.P.C. (4th) 284 (Ont. Gen. Div.) — referred to

General Accident Fire & Life Assurance Co. v. Tanter, [1984] 1 All E.R. 35 (Eng. Q.B.) — referred to

George Doland Ltd. v. Blackburn Robson Coates & Co., [1972] 1 W.L.R. 1338, [1972] 3 All E.R. 959 (Eng. Q.B.) — referred to

Great Atlantic Insurance Co. v. Home Insurance Co., [1981] 2 All E.R. 485, [1981] 2 Lloyd's Rep. 138, [1981] 1 W.L.R. 529 (Eng. C.A.) — considered

Hunter v. Rogers (1981), [1982] 2 W.W.R. 189, 34 B.C.L.R. 206, 1981 CarswellBC 391 (B.C. S.C.) — referred to

Jesionowski v. Gorecki (1992), 55 F.T.R. 1, (sub nom. *Jesionowski v. Wa-Yas (The)*) [1993] 1 F.C. 36, 1992 CarswellNat 145, 1992 CarswellNat 145F (Fed. T.D.) — referred to

Kaptsis v. Macias, 74 O.R. (2d) 189, 44 C.P.C. (2d) 285, 1990 CarswellOnt 390 (Ont. H.C.) — referred to

Kelly v. Kelly, 42 C.P.C. (2d) 181, 1990 CarswellOnt 354 (Ont. U.F.C.) — referred to

Leerentveld v. McCulloch, 4 C.P.C. (2d) 26, 1985 CarswellOnt 507 (Ont. S.C.) — referred to

Lowry v. Canadian Mountain Holidays Ltd., 59 B.C.L.R. 137, 1984 CarswellBC 432 (B.C. S.C.) — referred to

Mackin v. New Brunswick (Attorney General) (1996), 141 D.L.R. (4th) 352, 183 N.B.R. (2d) 223, 465 A.P.R. 223, 1998 CarswellNB 671, 19 C.P.C. (4th) 301, 1996 CarswellNB 671 (N.B. Q.B.) — referred to

Mahon v. Standard Life Assuraance Co. (April 25, 2000), MacLeod Master (Ont. S.C.J.) — referred to

Metropolitan Toronto Condominium Corp. No. 555 v. Cadillac Fairview Corp., 29 C.P.C. (2d) 110, 1988 CarswellOnt 449 (Ont. Master) — referred to

Nea Karteria Maritime Co. v. Atlantic & Great Lakes Steamship Corp., [1981] Com. L.R. 132 (Eng. Q.B.) — referred to

Ontario (Attorney General) v. Ballard Estate, (sub nom. *Ballard Estate, Re)* 20 O.R. (3d) 189, 5 E.T.R. (2d) 212, 1994 CarswellOnt 669 (Ont. Gen. Div. [Commercial List]) — referred to

Piché v. Lecours Lumber Co., 13 O.R. (3d) 193, 19 C.P.C. (3d) 200, 1993 CarswellOnt 447 (Ont. Gen. Div.) — not followed

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 32 B.C.L.R. (2d) 320, [1989] 2 W.W.R. 679, 1988 CarswellBC 411 (B.C. C.A.) — referred to

R. v. Stone, 1999 CarswellBC 1064, 1999 CarswellBC 1065, 24 C.R. (5th) 1, 239 N.R. 201, 63 C.R.R. (2d) 43, 173 D.L.R. (4th) 66, 134 C.C.C. (3d) 353, 123 B.C.A.C. 1, 201 W.A.C. 1, [1999] 2 S.C.R. 290 (S.C.C.) — considered

S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd., [1983] 4 W.W.R. 762, 35 C.P.C. 146, 45 B.C.L.R. 218, 1983 CarswellBC 147 (B.C. S.C.) — considered

Stevens v. Canada (Prime Minister), [1997] 2 F.C. 759, (sub nom. *Stevens v. Canada (Privy Council))* 144 D.L.R. (4th) 553, 72 C.P.R. (3d) 129, (sub nom. *Stevens v. Prime Minister (Can.))* 127 F.T.R. 90, 1997 CarswellNat 355, 1997 CarswellNat 2707 (Fed. T.D.) — referred to

Supercom of California Ltd. v. Sovereign General Insurance Co., 1998 CarswellOnt 788, 37 O.R. (3d) 597, 18 C.P.C. (4th) 104, 1 C.C.L.I. (3d) 305 (Ont. Gen. Div.) — referred to

Transmetro Properties Ltd. v. Lockyer Brothers Ltd., 4 C.P.C. (2d) 273, 1985 CarswellOnt 530 (Ont. H.C.) — considered

Vancouver Community College v. Phillips, Barratt, 27 C.L.R. 11, 38 L.C.R. 30, 20 B.C.L.R. (2d) 289, 1987 CarswellBC 400 (B.C. S.C.) — referred to

Whiten v. Pilot Insurance Co., 1999 CarswellOnt 269, [1999] I.L.R. I-3659, 170 D.L.R. (4th) 280, 117 O.A.C. 201, 42 O.R. (3d) 641, 32 C.P.C. (4th) 3 (Ont. C.A.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 31.06(3) — considered

R. 36.01(3) — referred to

R. 53.03 — referred to

MOTION by insured to compel production of report by insurer's expert.

***Ferguson J.*:**

1 The plaintiffs brought this motion to compel answers to undertakings and refusals on discovery. I ruled on most of the issues at the hearing but reserved on the issue of whether the defendants Lavery and Primus were obliged to produce a report from an expert.

Background

2 At one time Lavery and Primus were represented by the same counsel. They are now represented by separate counsel who took the same position on this motion. On this motion their previous separate representation makes no difference to the issue before me so I shall simply refer to them as Lavery.

3 Counsel for Lavery retained C. R. Eddie, an engineer, as an expert in this litigation. Mr. Eddie provided counsel with a report.

4 Counsel for Lavery subsequently retained Arcon Engineering Consultants Limited as an expert in this litigation and sent Arcon a copy of the C. R. Eddie report.

5 Counsel for Lavery produced to the plaintiff's counsel a report from Arcon which included this paragraph:

> On June 11, 1998 we were engaged to inspect the automobile, and to assess the extent to which her injuries may have been modified had she being [sic] restrained by a seat belt assembly. In order to assist us, we were provided with a variety of material, including the following:
>
> - The police motor vehicle accident report
> - Transcripts of telephone interviews of the other three automobile occupants
> - A report on this matter prepared by C. R. Eddie, P. Eng., dated October 2, 1997

6 There is no further mention of the C. R. Eddie report in the Arcon report and there is no evidence as to how, if at all, the C. R. Eddie report affected the investigation and opinion of Arcon.

7 There was no evidence before me as to the precise content of the C. R. Eddie report and the report was not filed on this motion. I inferred from the evidence that it contained an opinion on the same issue on which Arcon was retained.

8 Lavery listed the C. R. Eddie report in Schedule B of his affidavit of documents and claimed it was privileged.

9 On the discovery of Lavery, counsel for Lavery refused to produce the C. R. Eddie report. The Arcon re-

port was produced.

10 Counsel for Lavery undertook not to call Mr. Eddie as an expert at trial.

11 There is an additional unusual fact: counsel for Lavery permitted counsel for the plaintiffs to interview Mr. Eddie and he did so. From the evidence before me I infer that counsel for the plaintiffs received information from Mr. Eddie as to his opinion but obviously did not receive a copy of the report. It appears that the plaintiff's counsel understood Mr. Eddie's opinion to be the opposite of that expressed in the Arcon report.

12 On this motion the plaintiff contends that the C. R. Eddie report is no longer privileged and must be produced.

13 In my opinion the defendant is obliged to produce the C. R. Eddie report. I arrive at this conclusion on each of two analyses: by finding a waiver of litigation privilege attaching to the C. R. Eddie report as the result of permitting plaintiff's counsel access to the findings and conclusions of Mr. Eddie, and by interpreting the requirements of Subrule 36.01(3). I shall deal with each analysis separately.

The Waiver of Litigation Privilege Attaching to the Report

14 The evidence on this motion included evidence that in accordance with the defendant's counsel's permission Mr. Eddie met with the plaintiff's counsel who reported that he "did co-operate with us fully in providing information as to his findings and conclusions. There is no seatbelt issue!"

15 The report of Mr. Eddie was originally subject to litigation privilege as it was prepared at the instance of counsel for use in the litigation.

16 The disclosure of the report to a second expert does not constitute a waiver as the communications with that second expert are also originally subject to litigation privilege.

17 If the report itself had been disclosed to opposing counsel then there would be no doubt that there had been a waiver of the privilege: see the cases discussed in *Supercom of California Ltd. v. Sovereign General Insurance Co.*, [1998] O.J. No. 711 (Ont. Gen. Div.) at p. 8.

18 However, litigation privilege may be lost even where the document is not disclosed. If some of the information in the document is disclosed then the privilege in the entire document is waived. That was recently established by the decision in *R. v. Stone* (1999), 134 C.C.C. (3d) 353 (S.C.C.) which I shall discuss further below.

19 The general rule was established in earlier cases: see *George Doland Ltd. v. Blackburn Robson Coates & Co.*, [1972] 3 All E.R. 959 (Eng. Q.B.).

20 Perhaps the most cited of these is *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (B.C. S.C.) where Madam Justice McLachlin, as she then was, said at pp. 148-49:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication.

21 McLachlin J. reiterated a principle which had been expressed in a number of earlier cases which reached the same conclusion. See *Great Atlantic Insurance Co. v. Home Insurance Co.*, [1981] 2 All E.R. 485 (Eng. C.A.), where Templeman L.J. states at p. 492, para g:

> ... it would not be satisfactory for the court to decide that part of a privileged document can be introduced without waiving privilege with regard to the other part in the absence of informed argument to the contrary, and there can be no informed argument without the disclosure which would make argument unnecessary.

22 This approach has been coined by some writers as the "fairness test." As discussed by Wigmore, (8 Wigmore (McNaughton rev., 1961) note 28, at para 2327, at 635-36, cited in *Hunter v. Rogers* (1981), 34 B.C.L.R. 206 (B.C. S.C.):

> There is always the objective consideration when [a privileged person's] conduct touches a certain point of disclosure, fairness requires that his[/her] privilege shall cease whether [s/]he intended that result or not. [S/]He cannot be allowed, after disclosing as much as [s/]he pleases, to withhold the remainder. [S/]He may elect to withhold or to disclose, but after a certain point his[/her] election must remain final.

23 Other cases have interpreted this 'fairness' principle to require the full disclosure of documents where a partial disclosure would constitute "an attempt to mislead," (*Stevens v. Canada (Prime Minister)*, [1997] F.C.J. No. 228 (Fed. T.D.) at para 35.) See also *Lowry v. Canadian Mountain Holidays Ltd.* (1984), 59 B.C.L.R. 137 (B.C. S.C.); *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), [1989] 2 W.W.R. 679 (B.C. C.A.); *Mackin v. New Brunswick (Attorney General)* (1996), 141 D.L.R. (4th) 352 (N.B. Q.B.).

24 In my view Lavery's counsel's permitting the plaintiffs' counsel to interview Mr. Eddie constituted disclosure of information contained in the report to opposing counsel and therefore was a waiver of the litigation privilege in the entire report.

The Production Required by Subrule 31.06(3)

25 Although the issue of production in the case before me relates to the discovery stage, I believe we can obtain some general guidance from the recent decision in *R. v. Stone*, *supra* which dealt with a situation at trial.

26 In *Stone* the court dealt with a situation which developed in a criminal trial. At the conclusion of the Crown' case, defence counsel made an opening statement to the jury. He told the jury he would be calling an expert who would give an opinion as to the mental state of the accused and he told the jury what the opinion would be. The trial judge ordered defence counsel to produce the report of the expert before the case proceeded further.

27 The unanimous decision of the full court on this issue was briefly stated as follows. I have underlined some pertinent parts:

> **B. Forced Disclosure of Expert Report to Crown**
>
> [96] The appellant advanced a second issue on the conviction appeal, asserting that the trial judge had made a reversible error in ordering the production of Dr. Janke's report to the Crown at the outset of the defence case. McEachern C.J. agreed that a report prepared by a defence expert would normally be privileged and not properly subject to a disclosure order. However, he held that in light of comments made by defence counsel at the opening of the defence case, and the fact Dr. Janke's report would have been disclosed in any

event as soon as he took the witness stand, premature disclosure had not occasioned any miscarriage of justice.

[97] In my view, it was unnecessary to rely on the curative provision of s. 686 in this case. The appellant, through his counsel, waived the privilege in the report at the opening of the defence case. At that time defence counsel made the following references to the content of Dr. Janke's anticipated evidence:

> As I have indicated earlier, you have heard during the Crown's case what happened. You are now about to hear from Mr. Stone and from a forensic psychiatrist, Dr. Janke, why it happened. Dr. Janke will explain that Mr. Stone's state of mind at the time of the killing was known in psychiatric terms as a dissociative state.
>
> . . . . .
>
> Dr. Janke is a psychiatrist who works in private practice, on contract with the government, and he teaches at UBC. He will give evidence to explain in psychiatric terms his diagnosis of Mr. Stone's state of mind at the time of the attack. *He will say that Mr. Stone was in a dissociative state or acting as an automaton, that is, somebody who is acting unconsciously. He will say that as Mr. Stone was not acting consciously, he could not have intended to kill his wife.* [Emphasis added]

[98] By disclosing what he wanted from the report in favour of the accused, defence counsel could not then conceal the balance of the report whose contents might contradict or put in context what had been disclosed. It is true that Dr. Janke's report included not only his diagnosis, but a recital of the facts as provided by the appellant and which formed the basis of his expert opinion. It was through disclosure of the report, for example, that the Crown learned that the accused, contrary to his initial trial testimony, appeared to have some recall of the beginning of the fatal assault by way of a dream. The contents of the report, including the statements attributed to the appellant, were of course known to defence counsel at the time he chose to make the disclosure to the jury. It was not open to the appellant to pick and choose the portions of an expert report to be put before the trier of fact. Accordingly, the trial judge acted appropriately by ordering the production of Dr. Janke's report at the conclusion of the defence opening address.

[99] However, I would also, if it were necessary, give effect to the alternative ground accepted by McEachern C.J. The act of calling of Dr. Janke would certainly constitute waiver of any privilege attached to his report. As noted by McEachern C.J., once a witness takes the stand, he/she can no longer be characterized as offering private advice to a party. They are offering an opinion for the assistance of the court. As such, the opposing party must be given access to the foundation of such opinions to test them adequately. Given the fact that the report would have to have been disclosed after Dr. Janke's direct examination, the prior disclosure of the report cannot be said to have had any material impact on the outcome of the trial. Absent the earlier disclosure, the Crown would have been entitled to stand the appellant down before completing its cross-examination of him, and to recall him once they had been given an opportunity to consider the contents of the report. Accordingly, even if defence counsel's opening address had been insufficient to trigger disclosure, s.686(1)(*b*)(iii) of the *Code* would properly be applied to cure the error.

28 As there was no statute or rule regulating these issues in *Stone* the court's decision constitutes a statement of the common law which should inform my analysis concerning our civil Rules.

29 The decision indicates that the applicable common law rules are these:

(a) A report prepared by an expert at the request of counsel for litigation purposes is privileged. This would be under the category of litigation privilege.

(b) By announcing in an opening jury address the opinion of the expert contained in the report, counsel waives the privilege in the content of the entire report.

(c) The waiver extends to information in the report which would otherwise be subject to solicitor and client privilege. In *Stone* there was such information in the form of a statement by the client provided to the expert for litigation purposes.

(d) Counsel cannot waive privilege in only part of the report.

(e) Once an expert is called as a witness at trial the opposing party is entitled to production of the "foundation" of the expert's opinion.

30 While there is no mention in *Stone* of any information being disclosed in addition to the expert's report the reasoning of the court has much broader application.

31 The *Stone* decision may have overruled the Ontario decision in *Bell Canada v. Olympia & York Developments Ltd.* (1989), 68 O.R. (2d) 103 (Ont. H.C.). In *Bell Canada* one party called an expert and produced his reports. The opposing counsel demanded production of everything that the solicitor who retained the expert had sent to the expert. The position of the opposing counsel was that once the expert became a witness there was a waiver of privilege for all communications between the counsel and expert. He contended that he was entitled to anything which may have influenced the expert including information provided by counsel which the expert did not rely on. He relied on a ruling to this effect in *Vancouver Community College v. Phillips, Barratt* (1987), 20 B.C.L.R. (2d) 289 (B.C. S.C.).

32 The trial judge in *Bell Canada* refused to order production. In his reasons he expressed concern that to establish such a broad rule would jeopardize solicitor and client privilege. *Stone* has rejected that restriction. In addition, it has since been pointed out that the court in *Bell Canada* proceeded on the erroneous assumption that solicitor and client privilege and litigation privilege were the same: *Jesionowski v. Gorecki*, [1992] F.C.J. No. 816 (Fed. T.D.), at pp. 41-45.

33 The *Stone* decision also puts in doubt the decision in *Piché v. Lecours Lumber Co.* (1993), 13 O.R. (3d) 193 (Ont. Gen. Div.). In that case the court ruled that when an expert is called as a witness there is not an automatic waiver of the expert's entire file but only of the facts and assumptions provided to the expert by counsel and then only if those formed the basis of the expert's opinion. Loukidelis J laid out the following four principles in terms of waiver of privilege:

(1) Principles of waiver relating to a privilege claim for documents in an expert's file cannot be said to have been waived simply by calling that witness to give evidence.

(2) The privilege can be waived in respect of those facts or premises in the expert's file which have been used to base the expert's opinion and which came to the expert's knowledge from documents supplied to that expert.

(3) Whether there is a privilege or not can be ascertained by one of two ways. As in Ocean Falls, supra, the judge can examine the documents or materials for which privilege is claimed. Another way is for counsel,

through cross-examination of the expert, to determine whether all or part of the file is privileged.

(4) As a general rule, if facts are supplied that are not found in other evidence or if certain assumptions are asked to be made in the instructing documents, privilege claimed for those facts or assumptions should be considered waived.

34 With great respect, I do not think it is possible to apply these principles. I am reminded of the point of Templeton L.J. in *Great Atlantic Insurance Co.* How can the judge know what was or was not relied on or was influential without simply relying on what the expert might say? How can counsel explore the issue if the answers to the questions might disclose privileged information? The application of these principles would simply delegate the task to the person whose opinion, and perhaps integrity, is under scrutiny. And it would prevent opposing counsel from making any submissions.

35 As I shall discuss later, the court in *Stone* did not read the report, did not question the expert as to what he relied on and yet clearly ruled that even information contradictory to the opinion given in testimony had to be disclosed.

36 In my view the ruling and reasoning in *Stone* should affect the interpretation of subrule 31.06(3) which states:

(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,

(a) the findings, opinions and conclusions of the expert relating to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose, and

(b) the party being examined undertakes not to call the expert as a witness at trial.

37 I note that the subrule does not require the production of the expert's report: *Leerentveld v. McCulloch*, [1985] O.J. No. 1695 (Ont. S.C.). That production is required by Rule 53.03 but not until a later stage in the action.

38 Subrule 31.06(3) can arguably apply to two layers of the facts before me (disregarding the evidence concerning the interview of Mr. Eddie by the plaintiffs' counsel].

39 First, we have the application of the rule to Mr. Eddie as an expert. No production is required here because the defendant's counsel undertook not to call Mr. Eddie as a witness.

40 Next we have the application of the rule to Arcon. The issue here is whether Mr. Eddie's report falls within the term "findings".

41 There are many reported cases interpreting the scope of "findings, opinions and conclusions".

42 In *Transmetro Properties Ltd. v. Lockyer Brothers Ltd.* (1985), 4 C.P.C. (2d) 273 (Ont. H.C.) the court ruled that "findings" included "the documents, the calculations and the engineering data upon which the opinion and the conclusions were drawn" (at p. 279).

43 Mr. Alan Mark wrote a critical case comment on this decision: op.cit. at p. 274. He argued that the dictionary meaning of "findings" did not justify that interpretation. He also argued that the rule did not contemplate pre-trial discovery of an expert and that this must await trial.

44 Since *Transmetro* there have been a number of conflicting decisions.

45 The line of cases giving the term "findings" broad meaning have found the following to be included:

(a) Technical calculations prepared by the party and sent to the expert: *Athabaska Airways Ltd. v. De Havilland Aircraft of Canada Ltd.* (1988), 34 C.P.C. (2d) 298 (Ont. H.C.).

(b) The raw data and test scores used: *Cacic v. O'Connor* (1990), 71 O.R. (2d) 751 (Ont. H.C.); *Beck v. La Haie* (1989), 38 C.P.C. (2d) 67 (Ont. Master).

(c) The disclosure of "findings, opinions and conclusions" of experts should not be restricted to final findings, opinions and conclusions or to written reports. Any finding, opinion or conclusion expressed in sufficiently coherent manner that it can be used by counsel ought to be disclosed on the examination for discovery: *Cheaney v. Peel Memorial Hospital* (1990), 73 O.R. (2d) 794 (Ont. Master)

(d) The field notes, raw data and records made and used by the expert in preparing her/his report: *Award Developments (Ontario) Ltd. v. Novoco Enterprises Ltd.* (1992), 10 O.R. (3d) 186 (Ont. Gen. Div.).

(e) The research, documents, calculations and factal data relied on by the expert: *Allen v. Oulahen* (1992), 10 O.R. (3d) 613 (Ont. Master).

(f) All documents, video tapes, photographs and any information which were forwarded to expert witnesses as well as full detailed disclosure of all surveillance observations conducted on the plaintiff which were disclosed in surveillance reports, (including all observations which were visible or discernible in photographs, film, or videotape): *Beausoleil v. Canadian General Insurance Co.*, [1993] O.J. No. 2200 (Ont. Gen. Div.)

(g) A surveillance video tape which was shown to the defence expert and referred to in his report: *Binkle v. Lockhart* (1994), 24 C.P.C. (3d) 11 (Ont. Gen. Div.)

(h) the information and data obtained by the expert, contained in documents or obtained through interviews, on the basis of which conclusions are drawn and an opinion formed: *Ontario (Attorney General) v. Ballard Estate* (1994), 20 O.R. (3d) 189 (Ont. Gen. Div. [Commercial List]) and unreported additional reasons of December 14, 1995.

(i) Notes of correspondence between the plaintiff's accountant and the plaintiff's prospective employer, which were used to prepare the accountant's report (including notes and correspondence between the plaintiff and his current employer and between the plaintiff and his prospective employer): *Casey v. Orr* , [1996] O.J. No. 425 (Ont. Gen. Div.)

46 The line of cases giving the term "findings" a narrower interpretation found the following were not included:

(a) The notes of interviews conducted by the expert: *Bronstetter v. Davies* (1986), 11 C.P.C. (2d) 289 (Ont. H.C.).

(b) The notes and records on which the report is based: *Metropolitan Toronto Condominium Corp. No. 555 v. Cadillac Fairview Corp.* (1988), 29 C.P.C. (2d) 110 (Ont. Master).

(c) The expert's clinical notes and records: *Kaptsis v. Macias* (1990), 74 O.R. (2d) 189 (Ont. H.C.).

(d) Preliminary drafts of the expert's report: *Kelly v. Kelly* (1990), 42 C.P.C. (2d) 181 (Ont. U.F.C.).

(e) An instructing letter from counsel to an expert witness: *Calvaruso v. Nantais* (1992), 7 C.P.C. (3d) 254 (Ont. Gen. Div.)

(f) Documents to which only "passing reference" is made: *Bardossy v. Cameo Restaurant Ltd.*, [2000] O.J. No. 2385 (Ont. S.C.J.)

47 I find that the weight of authority and the recent trend is to give a broad interpretation to the term "findings." It was noted by Carthy J.A. in the recent Ontario Court of Appeal decision, *General Accident Assurance Co. v. Chrusz* (1997), 17 C.P.C. (4th) 284 (Ont. Gen. Div.) that "our modern rules certainly have truncated what would previously have been protected from disclosure." (at p.332.)

48 As he also said:

> In a very real sense, litigation privilege is being defined by the rules as they are amended from time to time. Judicial decisions should be consonant with those changes and should be driven more by the modern realities of the conduct of litigation and perceptions of discoverability than by historic precedents born in a very different context. (at p.332)

49 The narrowing of litigation privilege has been advocated by numerous Ontario writers as the best means of pursuing truth in a fair process and of facilitating early and just resolutions in litigation: Waddell, "Litigation privilege and the expert: In the aftermath of Chrusz", *The Advocates' Society Journal*, November 2001, Vol. 20., No. 2; McLeish and Smitiuch, "Expert Evidence: Setting the Stage for Expert Evidence at Trial", *Advocates' Quarterly* Vol. 22, No. 4. It should also be noted that the view is not entirely a recent one, as evidence by the comments of Professor Garry D. Watson, in his article "Solicitor-Client Privilege in Litigation: Current Developments and Future Trends", Canadian Bar Association, Ontario, Continuing Education, delivered on October 19, 1991.

50 While it may not be consistent with the dictionary meaning of the term "findings", I think the broader approach is now established and in my view is appropriate to accomplish the purpose of the subrule.

51 Subject to the issue of causation or reliance discussed below, I conclude that an expert report from one expert which is sent to another expert who is going to be called at trial falls within the scope of production established by the weight of authority.

52 I conclude that subrule 31.06(3) requires production of the C. R. Eddie report at discovery because it is part of the "findings" of the expert Arcon.

Should production be restricted to documents which formed the basis of the opinion?

53 One of the issues also dealt with in the above cases is whether the information included in the "findings" is restricted to that which the expert actually relied on. Many of the cases cited restricted the information in that way, (see *Bell Canada, supra*; *Beausoleil, supra*).

54 In my view that is no longer a proper restriction. The fundamental difficulty with that principle is that there is no practical and fair way to determine what documents (either in whole or in part) have been influential or relied upon. As stated by Mustill J. in *Nea Karteria Maritime Co. v. Atlantic & Great Lakes Steamship Corp.*, [1981] Com. L.R. 132 (Eng. Q.B.) (as cited by Hobhouse J in the case of *General Accident Fire & Life Assurance Co. v. Tanter*, [1984] 1 All E.R. 35 (Eng. Q.B.), at 43):

> where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.

55 The same point was made by Templeman J in *Great Atlantic Insurance*, *supra* at 492, para. h, where he stated:

> ... the rule that privilege relating to a document which deals with one subject matter cannot be waived as to part and asserted as to the remainder is based on the possibility that any use of part of a document may be unfair or misleading, that the party who possesses the document is clearly not the person who can decide whether a partial disclosure is misleading or not, nor can the judge decide without hearing argument, nor can he hear argument unless the document is disclosed as a whole to the other side. Once disclosure has taken place by introducing part of the document into evidence or using it in court it cannot be erased.

56 What was relied on is an issue here because it appears the C.R. Eddie report came to a different conclusion than the report prepared by Arcon and therefore may not have been relied on or used in any way by Arcon. The Arcon report is silent as to whether or to what extent the C.R. Eddie report influenced the Arcon opinion.

57 The trial judge in *Stone* ordered production of the expert's report on the ground that opposing counsel "ought to be in a position of being able to explore on cross-examination with the accused whatever statements Dr. Janke may or *may not* have relied upon in his report": at para. 20. [My underlining] The fact that his ruling was upheld implies that opposing counsel is entitled to disclosure of what information was provided to the expert even if it is not relied on.

58 The Supreme Court in *Stone* said that the purpose of the production is to permit opposing counsel to test the expert's opinions. It contemplated that the content of a report might contradict the opinion given in testimony. So might other information in the expert's possession. An opinion can obviously be tested in many ways: by comparing the conclusion to the data relied on, by comparing the opinion to data which was available but not relied on, by considering whether the expert's opinion was influenced by the nature of the request of counsel or by information provided by counsel which was not relied on, and by considering whether the opinion was altered at the request of counsel — for instance, by removing damaging content.

59 It is difficult to understand how a determination could be made as to what was influential. Would counsel decide? Would the expert decide? Why should this decision not be open to scrutiny? The expert might not realize or acknowledge the extent to which information provided has influenced his or her opinion.

60 It seems logical that if counsel sends the expert information counsel does so because he or she believes this information is relevant to the expert's task. If it is relevant to the task then it seems to me it should be available to counsel who must test the opinion.

61 If counsel for the defendant sent the C. R. Eddie report to Arcon it seems axiomatic that counsel must have considered it relevant to the task assigned to Arcon.

62 In *Stone* the court did not require the trial judge to consider the content of the report before ordering its production. In my view this indicates that the court need not conduct a voir dire in this regard. The *Stone* decision also implies that there is no need to rely on counsel's vetting the material or rely on the expert doing so because the court did not suggest that either instructing counsel or the expert should be involved in the decision. The judge simply ordered production.

63 *Stone* makes clear that production should be ordered even if it involves the disclosure of information, such as statements of the client, which would otherwise be subject to solicitor and client privilege.

64 In *Stone* the only document ordered produced was the report. However, subrule 31.06(3) requires production of "findings".

65 While the full scope of Rule 31.06(3) at the discovery stage and the scope of the common law at the trial stage are not issues before me it is important to consider the direction in which the ruling in *Stone* and my more limited ruling in this case may take us.

66 It is my tentative view that our system of civil litigation would function more fairly and effectively if parties were required to produce all communications which take place between counsel and an expert before the completion of a report of an expert whose opinion is going to be used at trial.

67 I can appreciate that discussions between counsel and experts for educational purposes might generally best be ruled to be within the zone of privacy protected by litigation privilege. For instance, counsel might communicate with the expert to discuss what information the expert needed to prepare an opinion. Counsel might also want to communicate with the expert to discuss questions which might be put to the expert or to the opposing expert at trial.

68 If the communications took place before the preparation of the report then I am inclined to think it would best for our system of litigation if they were producible because they could influence the opinion and there would be no practical way of determining this without producing and examining the communications and hearing submissions on the issue.

69 Any experienced counsel who has dealt with experts would appreciate how important it would be to know what the expert was instructed to do, what the expert was instructed not to do, what information was sent to the expert and the extent to which counsel instructed the expert as to what to say, include or omit in the report. McLeish and Smitiuch discuss in their article numerous cases which struggled with these issues. I would guess that every experienced litigation counsel knows such influential factors are not rare but commonplace. A recent and alarming example was discussed in the recent case of *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641 (Ont. C.A.).

70 In my view the disclosure of this information would best enable an opposing counsel and the court to as-

sess whether the instructions and information provided affected the objectivity and reliability of the expert's opinion. I also note there is much contrary opinion on this subject: eg. *Mahon v. Standard Life Assuraance Co.*, [2000] O.J. No. 2042 (Ont. S.C.J.)

71 This area of the case law cries out for appellate review.

72 There is much cynicism among the bench and bar concerning the objectivity and reliability of experts' opinions in to-day's litigation. I believe requiring full production concerning the origins of the opinion would deter inappropriate influence on an expert and help restore confidence in the process.

73 I should add that there is no suggestion in this case of any inappropriate influence on the expert.

Should the production take place at discovery or trial?

74 It might be argued that subrule 31.06(3) should not be interpreted to require production at discovery because such production should be dealt with at trial. I don't agree.

75 As noted in *Stone*, if the issue is not dealt with until trial, the opposing counsel will then be entitled to an adjournment in order to review the material then produced. That could cause significant delay. In some cases it might take days for counsel to review the material. Counsel might also need time to review the material with its own expert. As noted in *Binkle v. Lockhart*, *supra*, the experts of the various parties should all be on the same footing at trial by having access to the same background information: at para. 14.

76 When the information is disclosed it might well affect counsel's assessment of the merits of the case and of the value of proceeding with the trial. Earlier production might have made a trial unnecessary. If the production only takes place at trial the cross-examining counsel will not be in a position to succinctly use it in cross-examination unless the material is minimal. It takes preparation to cull information and consider whether or how to use it to test an expert's opinion. The trial is a time for examination and cross-examination not for production and preparation.

Conclusion

77 I conclude that the C. R. Eddie report must be produced for two reasons. First, the litigation privilege attaching to the document was waived when the instructing counsel permitted the author to disclose information it contained to opposing counsel. Second, unless the defendant's counsel undertakes not to call a member of Arcon as an expert at trial, subrule 31.06(3) requires that it be produced as part of the findings of Arcon.

78 In view of the divided success on the motion I am inclined to think this is not a situation where any costs should be awarded.

79 If any counsel seeks costs he should send me written submissions by February 22. Any responding submissions should be sent by March 9.

Motion granted.

END OF DOCUMENT

TAB 12

COURT FILE NO.: CV-06-3257-00
DATE: 20080506

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARVIN NEIL SILVER and CLIFF COHEN

Plaintiffs

v.

IMAX CORPORATION, RICHARD L. GELFOND
BRADLEY J. WECHSLER and FRANCIS T. JOYCE

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: van RENSBURG J.

COUNSEL: D. Lascaris and M. Robb, for the Plaintiffs

D. Peebles and L. Lung, for the Respondents (Defendants and Proposed Defendants)

HEARD: April 15, 2008

ENDORSEMENT

[1] This is a motion to compel answers to questions refused during cross-examinations on a pending motion. The questions are set out at Schedule "A" to the Notice of Motion dated April 9, 2008. By the time the motion was argued, the respondents had agreed to answer certain refusals and some of the questions had been abandoned or withdrawn. In total the parties were seeking rulings on some 26 questions.

The Proceedings

[2] This is the first proceeding to be brought under Part XXIII.1 of the Ontario *Securities Act* (the "Act"). Section 138.3 provides a statutory cause of action for secondary market misrepresentation. To paraphrase the section, where a responsible issuer releases a document containing a misrepresentation, persons or companies who acquire or dispose of the issuer's securities between the time of the misrepresentation and its public correction have a cause of action without regard to reliance, against the responsible issuer and others, including its directors at the time of release of the document and its officers who authorized, permitted or acquiesced in its release.

[3] Section 138.4 of the Act is entitled "Burden of Proof and Defences". Relevant to these proceedings are the defences set out in subsection (6) which (again paraphrasing) states that a person or corporation is not liable under s. 138.3 in relation to a misrepresentation if that person or corporation proves that: (i) before release of the document containing the misrepresentation, the person or company conducted or caused to be conducted a reasonable investigation; and (ii) at the time of release of the document, the person or company had no reasonable grounds to believe that the document contained the misrepresentation. Subsection (7) lists certain factors to be considered by the court in determining such a defence. Also relevant is ss. 138.4(1). Where a

misrepresentation is in a document that is not a core document [such as a press release] the plaintiff must prove that the person or company (a) knew, at the time that the document was released that the document contained the misrepresentation; (b) at or before the time that the document was released, deliberately avoided acquiring knowledge that the document contained the misrepresentation; or (c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document that contained the misrepresentation. There are other provisions under s. 138.4 that may be relevant to these proceedings, however the denial of knowledge of any misrepresentation and the "reasonable investigation" due diligence defence are the focus of the affidavits put forward by the prospective defendants at this time, and help to define the scope of the proceedings for the purpose of this refusals motion.

[4] Section 138.8 provides what the parties have described as a "gatekeeper" function for the court in respect of such proceedings, requiring leave to commence proceedings in respect of the statutory cause of action, and setting out the procedure to be followed in bringing and opposing a motion for leave. That section provides as follows:

> 138.8(1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

(a) the action is being brought in good faith; and

(b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

(3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

(4) A copy of the application for leave to proceed and any affidavits filed with the court shall be sent to the Commission when filed.

[5] These proceedings were initially commenced by two separate proposed class actions in September 2006. On September 20, 2006 the plaintiffs issued a joint Statement of Claim in this action. The Claim sought damages against Imax Corporation ("Imax") and certain other defendants for common law causes of action, including negligent and fraudulent misrepresentation and conspiracy. In November 2006 a motion was served for leave under Part XXIII.1 of the Act, for certification of these proceedings as a class action and for leave to add certain additional persons as defendants. Counsel and the court have agreed that, although there is no requirement for the certification and leave motions to be heard together, argument with respect to all such relief will proceed in the first week of June 2008.

[6] A proposed amended claim, entitled Fresh Statement of Claim, is in the leave materials. This document sets forth the statutory claims the plaintiffs

propose to advance. The specific representation at issue in these proceedings is defined in the Fresh Statement of Claim as follows:

> **"Representation"** means the statement explicitly and/or implicitly contained in the **February Press Release** and expressly repeated in the **Form 10-K** and **Annual Report**, that Imax's revenue for the 2005 fiscal year were prepared and reported in accordance with **GAAP** and that such revenues met or exceeded the earnings guidance previously issued by Imax.
>
> **"February Press Release"** is defined as the press release dated and released on February 17, 2006 by Imax and **"Form 10'K"** is defined as Imax's Form 10-K for the fiscal year ended December 31, 2005, which was required to be filed with the Securities and Exchange Commission under the *United States Securities and Exchange Act of 1934*, and which included the **Annual Report. "Annual Report"** is defined as Imax's annual report for the year ended December 31, 2005, which contained Imax's management's discussion and analysis and audited annual financial statements for the same period.

[7] The plaintiffs allege that Imax's financial results between February 17, 2006 and August 9, 2006 did not comply with Generally Accepted Accounting Principles ("GAAP") and were materially false and misleading. The February Press Release reported that the company had successfully completed 14 theatre system installations in the most recent quarter, a record for a single quarter. On March 9, 2006 Imax released its audited financial results for 2005 and announced that it was putting itself up for sale. On June 20, 2006, the U.S. Securities and Exchange Commission ("SEC") wrote to Imax to request an interview to discuss, among other things, Imax's revenue recognition policies and practices. On August 9, 2006 Imax issued a press release disclosing the SEC request and that, of the 14 theatre systems it had previously stated were completed in the fourth quarter of 2005, ten had not opened during that quarter,

and that the screens for seven of the ten were not installed until 2006, and in some cases not until the second half of 2006. Initially Imax took the position with the SEC that its 2005 financial statements complied with GAAP. In July 2007 Imax restated its 2005 financial results and moved to subsequent periods revenue that it had initially recognized on the ten theatre installations in the fourth quarter of 2005.

[8] In support of their motion the plaintiffs filed the affidavit evidence of the proposed representative plaintiffs, three proposed experts and a member of the class counsel team. In response, each respondent (including parties proposed to be added as defendants) has sworn an affidavit. There are also affidavits of a proposed defence expert and the affidavit of a law clerk employed by the respondents' counsel.

[9] Each of the individual respondents' affidavits, with the exception of the affidavit of Kenneth Copland, assert that the respondent during the period February 17, 2006 to August 9, 2006:

(a) fulfilled his or her duties as an officer and/or director of Imax with respect to the reporting of its expected and ongoing financial performance with care and diligence;

(b) believed, based upon a reasonable investigation, that Imax's financial statements for 2005 had been prepared in accordance with GAAP;

(c) believed that the Representation was accurate when made and had no reasonable grounds to believe that it was false;

(d) relied upon Imax's auditors, PriceWaterhouseCoopers ("PWC") to properly prepare Imax's financial statements for public disclosure and regulatory filing;

(e) together with other Imax management, concluded that internal control over financial reporting was effective and that there were no material weaknesses in internal control;

(f) together with other Imax management, conducted a reasonable investigation, including seeking advice and guidance from PwC in relation to revenue recognition, to ensure that Imax properly applied GAAP to its financial statements for the 2005 fiscal year and reported their efforts in that respect to the Audit Committee and to the Board;

(g) understood, upon investigation, that the Audit Committee had met regularly with PwC, including meeting without management and concluded that PwC had a full opportunity to advise the Audit Committee of any issues regarding management and the adequacy of Imax's systems of accounting, and relied on PwC's audit of Imax's financial statements and of the company's internal control over financial reporting; and

(h) relied on PWC's March 9, 2006 audit opinion that concluded that Imax's financial statements were prepared in conformity with GAAP.

[10] Each of the deponents also adopts the evidence of Kenneth Copland "to the extent of [his or her] own personal knowledge". Mr. Copland is the Chair of the Audit Committee of Imax. His affidavit contains detailed factual information concerning Imax's business and accounting practices and policies, in particular with respect to revenue recognition for theatre systems, the involvement of

management and PwC in reporting and auditing the 2005 financial results and the restatement in 2007. The Copland affidavit attaches numerous exhibits.

[11] The plaintiffs conducted an examination under Rule 39.03 of Lisa Coulman, a partner of PricewaterhouseCoopers, Imax's auditors during the relevant period. The deponents of the affidavits filed in respect of the motion have also been cross-examined. The examinations resulted in numerous undertakings and refusals. It is only certain remaining refusals from the examinations of the respondents that are at issue in this motion.

The Applicable Test

[12] Typically, the test for whether a question should be answered in an examination for discovery is whether the information to be elicited has a "semblance of relevance" to the issues in the action. The same test is applicable to cross-examinations of deponents in motions. In such cross-examinations, a deponent may be asked questions not only about the facts deposed in his or her affidavit, but also questions within his or her knowledge which are relevant to any issue on the motion. Master Macleod in *Caputo* v. *Imperial Tobacco Ltd.* (2002), 25 C.P.C. (5th) 78 (affd. on appeal at 33 C.P.C. (5th) 214) put the rules succinctly as follows:

- If you put it in, you admit its relevance and can be cross-examined on it – at least within the four corners of the affidavit;
- You can't avoid cross-examination on a relevant issue by leaving it out;
- You can't get the right to cross-examine on an irrelevant issue by putting it in your own affidavit; and
- You can be cross-examined on the truth of facts deposed or answers given but not on irrelevant issues directed solely at credibility.

[13] Counsel for the respondents argued for a more restrictive test than "semblance of relevance" for determining the propriety of any question during cross-examinations in the leave proceedings. The first argument for restraint was based on the fact that there are as yet no defendants to the statutory claims. It was submitted that there is no pre-action right of discovery and as a general rule a plaintiff cannot compel production and disclosure from a prospective defendant.

[14] Respondents' counsel also urged the court to adopt a restrictive approach, arguing that the gatekeeper function of the court is the counterbalance to the new statutory cause of action that relieves a shareholder in certain circumstances from having to prove reliance on an issuer's misrepresentation. This function has been described by the Canadian Securities Administrators (2000), 23 OSCB, as follows:

> One of the risks of creating statutory liability for misrepresentations or failures to make timely disclosure is the potential for investors to bring actions lacking any real basis in the hope that the issuer will pay a settlement just to avoid the cost of litigation. To limit unmeritorious litigation or strike suits, plaintiffs would be required to obtain leave of the court to commence an action. In granting leave, the court would have to be satisfied that the action (i) is being brought in good faith, and (ii) has a reasonable possibility of success.

[15] The respondents argued that the "semblance of relevance" test would negate the gatekeeper function of the court. They argued for a limitation on the right to question, keeping in mind the general principle that a shareholder is not entitled to compel a company to produce confidential documents.

[16] Respondents' counsel did not propose an alternative workable test, but argued for restraint on the part of the court in ordering the respondents to provide extensive production of otherwise confidential information and documentation at this stage in the proceedings.

[17] In my view these arguments are not persuasive. The fact that proposed defendants are not required generally under the Rules to make documentary production and are not subject to discovery is irrelevant, as is the observation that shareholders do not generally have access to confidential records of issuers. The *Securities Act* provides its own procedure in respect of the statutory remedy, that specifically requires proposed defendants to put forward information (presumably otherwise confidential and non-compellable information to the extent it may be relevant to their defence) and that specifically authorizes examination

on such information. A shareholder who seeks leave to commence a claim under s. 138.8 has special powers that are available in the context of such a claim and not generally.

[18] This is clearly not a pleadings motion, that is, the court is not ruling on whether the claims set forth by the plaintiff in its pleadings, if true, set forth a cause of action or are frivolous or vexatious. In this motion, much more is required of both the plaintiffs and the respondents. The plaintiffs cannot rely on their allegations, but must put forward evidence, which in turn can be tested in cross-examination. Likewise, in opposing leave, each prospective defendant must come forward with its defences, with evidence in support. The merits of the claim are clearly relevant, and based on the evidence adduced and tested, the plaintiffs must establish their good faith and that the action has a reasonable possibility of success at trial.

[19] The challenge is that these are the first proceedings under Part XXIII.1 of the Act. The Act provides no guidance as to the interpretation of the threshold test and what type, quality and quantity of evidence a court is to consider in making a determination of the plaintiffs' good faith and the reasonable possibility of the plaintiffs' success at trial. We are left with what the statute prescribes – a mandatory requirement for each plaintiff and each proposed defendant to set out facts by affidavit, with the right to cross-examine the deponents of such affidavits.

There is no indication in the statute that evidence put forward or examined upon must be restricted to what is in the public record. Indeed, the facts to support a due diligence defence are generally in the possession and control of the party asserting such a defence. There is no requirement in the statutory procedure for an affiant to attach documentary exhibits, but it is not unusual for exhibits to be attached to affidavits, and the parties in this case have attached extensive exhibits to their affidavits.

[20] This is not a discovery process, in the sense that the parties are not compelled to produce affidavits of documents disclosing all relevant documents within their power or control, and they are not subject to examination on everything having a semblance of relevance to the action, including the common law claims. In deciding this motion the court must take a hard look at what facts are potentially relevant and material to the statutory claim and defences, as presented in the draft pleading and in the respondents' affidavits. Any question which is clearly not tethered to this inquiry in the sense that it is pursuing other potential wrongdoing or practices of Imax, would have no semblance of relevance. However a question that is potentially relevant to the facts alleged in respect to the statutory claims set out in the proposed statement of claim and in the defences raised in the responding affidavits must be answered even if it

might also reveal some other potential issues or wrongdoing not currently contemplated by the statutory claim.

[21] Finally, I note the observation of Master Macleod in *Caputo*, that a ruling on the propriety of a question on cross-examination at this stage does not determine the admissibility of such evidence at the hearing itself. It will remain open to the respondents to argue that any piece of oral or documentary evidence elicited in examination, notwithstanding its "semblance of relevance" at this stage, is inadmissible as irrelevant at the time of the full consideration of the leave motion.

The Specific Refusals

[22] The parties grouped the refusals into five headings, which I will follow in these reasons.

1. The Imax Investigation of the "Delhi Post"

The pertinent background facts are taken from the respondents' factum:

> In the course of the examination of the PwC representative, Lisa Coulman, information emerged that in November 2005 Imax was alerted to a post written on a Yahoo! Internet message board (the "Delhi post"), stating that Imax was the subject of an SEC investigation and containing numerous allegations of fraud by Imax with respect to "faking" theatre system installations and in particular the Delhi, India installation. The contents of the post were also emailed to the company and according to the email copied to the SEC. The post was anonymous and the company was not in fact under investigation by the SEC at the time. There was no reply when Imax responded directly to the author's email asking for further information. The Imax Board asked its in-house counsel, Robert Lister, to investigate the allegations. The Imax affiants were examined under oath as to the origin of and reaction to the post, about the instructions given to Mr. Lister, about involvement of PwC in the process and about the result of the investigation. PwC was advised of the post and it reviewed the contract, the installer's report, the

> customer acceptance package and other documents pertinent to the Company's relationship with that customer. PwC concluded that the accounting position which Imax had taken for Q3 was acceptable. Mr. Lister completed a report which he presented to the Board. The Board concluded that there was no evidence of fraud or wrongdoing, and that revenue had been properly recognized. Nevertheless, the recommendation was made by Mr. Lister that for the Q4 and the year end audit, the company should enhance the documentation it gave to PwC of its proposed revenue recognition determinations for various installations and that process was followed.

[23] Several questions about the Delhi post and its investigation were answered and a number of questions initially refused have been answered in whole or in part. In the answers to undertakings the respondents indicated that Jeff Vance, as head of the company's SOX program, was asked by the Audit Committee to conduct a separate investigation into the financial accounting issues arising from the allegations in the Delhi post. He prepared a separate report on the accounting issues and reported directly to the Audit Committee, and a copy of his report has been produced.

[24] The remaining refusals are as follows:

> Q. 72 (Gelfond)
>
> To produce the agreement relating to the Delhi cinema and any documentation evidencing acceptance of the theatre system (i.e. the Certificate of Acceptance) whenever it may have been executed or delivered.
>
> Q. 71 (Gelfond)
>
> To produce a list of all persons interviewed during the Yahoo! Posting investigation.
>
> Q. 70 (Gelfond)

To produce the documents examined in the investigation of the Yahoo! Posting, in order to allow Mr. Lister or the Audit Committee to form a view about it.

Q. 56 (Wechsler)

With respect to the report prepared by Mr. Lister following the investigation into the Yahoo! Post, to advise what inquiries were made and what factual conclusions the report based its conclusions on.

Q. 55 (Wechsler)

To produce a copy of the report prepared by Rob Lister analyzing the allegations arising from the Yahoo! Message board posting.

[25] The respondents argued that questions about the underlying contracts and other documents in relation to the Delhi installation are irrelevant to the issues in these proceedings. They also claim solicitor-client privilege and litigation privilege in respect of the investigation undertaken and report provided by Mr. Lister as in-house counsel.

[26] In her examination Ms Coulson noted that revenue for the Delhi installation was eventually moved from Q3 to Q4 2005. This theatre installation was not referenced in the February 2006 press release as one of the 14 installations that had been completed in Q4 2005, and accordingly does not form part of the misrepresentation alleged in these proceedings. The Delhi post however alleged improper revenue recognition by Imax and the timing occurred

shortly before the February 2006 press release. Whether and to what extent the respondents were put on notice that there was a concern about the company's approach to revenue recognition in respect of as-yet incomplete theatre installations, the reaction of Imax management, the investigations undertaken and the conclusions reached and relied upon are all potentially relevant to the due diligence defence of the respondents in relation to the misrepresentation.

[27] The evidence to which I was referred does not satisfy me that the dominant purpose for the investigation carried out by Mr. Lister was to respond to anticipated litigation. While the respondents point to the fact that the Delhi post was copied to the SEC, so that there was a reasonable apprehension that proceedings could result, there is no evidence that the investigation by Mr. Lister was premised on the potential SEC proceedings or undertaken for the purpose of responding to such anticipated proceedings. The Board was informed of the allegations in the Delhi post and asked Mr. Lister to investigate. Ultimately the investigation satisfied the Board that there was no evidence of fraud or wrongdoing and that revenue had been properly recognized. The steps that were taken by Mr. Lister in carrying out the investigation, the documents reviewed and the individuals with whom he spoke in conducting the investigation in order that he could report back to the Board, as well as his report and specific recommendations, are not covered by litigation privilege.

[28] I am also of the view that any solicitor-client privilege that might attach to Mr. Lister's report to the Board as a communication between counsel and its client has been waived. The summary from the respondents' factum suggests that the Board relied on Mr. Lister's report in concluding that there was no fraud and that revenue had properly been recognized, and specifically refers to a recommendation from Mr. Lister that was followed. Where a party contends that its state of mind is based on legal advice received, there is an implied waiver of privilege in respect of that advice (*Bank Leu AG* v. *Gaming Lottery Corp.* [1999] O.J. No. 3949). The full extent of Mr. Lister's report respecting the Delhi post, including all recommendations and advice is relevant to the due diligence defence, and any privilege that would otherwise apply has been waived.

[29] Questions 71, 70, 56 and 55 shall be answered. Q. 72 as framed, need not be answered. The documents relating to the Delhi cinema are not directly relevant to these proceedings. Of course, if such documents were examined in the investigation of the Delhi post, then they will be produced in response to Q. 70.

2. <u>The 2005 Year End Audit (by Imax and PwC)</u>

The following refusals have been grouped under this heading:

Q. 75 (Gelfond)

To produce the contracts relating to the 10 theatre systems described in the August 9, 2006 press release which were included in revenue for the fourth quarter of 2005 for theatres that were not opened in that quarter.

Q. 76 (Gelfond)

To provide copies of all reports on installations provided by the business affairs unit to Mr. Gelfond or Mr. Wechsler during the fourth quarter of 2005 and in January of 2006.

Q. 110 (Copland)

To advise which Imax customers were asked to proceed with installations prior to the quarter in which the theatre was scheduled to open, and which Imax personnel made that request.

Q. 111 (Copland)

With respect to customers of whom a request was made to proceed with installations prior to the quarter in which the theatre was scheduled to open, to advise whether in any of those cases, the request was to accept installation at a date earlier than that envisioned by the contract with the customer.

Q. 130 (Gamble)

To produce any written amending agreements prepared during the 2005 audit to reflect verbal agreements made during 2005 between Imax and its customers, and any documentation assembled to evidence those verbal amending agreements, whether they are the amending agreements referred to at para. 1 of tab B3 of Ex. 16 (the February 27, 2007 OSC letter to Imax) or some other agreements.

Q. 146 (Joyce)

To determine whether there were multiple iterations of the list of installations that could potentially be complete in Q4 2005 prepared by Imax's finance or business affairs groups, and if so, how many iterations, whether copies were retained, and if they were retained, to produce copies of them.

Q. 147 (Joyce)

To produce project completion reports for any installation that was on any iteration of the financial department list of installations that could be complete in Q4 2005.

Q. 148 (Joyce)

To produce copies of any client acceptance forms for theatres that were on any iteration of the financial department list of installations that could be complete in Q4 2005.

Q. 46 (Wechsler)

To produce copies of biweekly status reports regarding signings, along with any attachments, for 2004, 2005 and until the end of the class period in 2006.

Q. 50 (Wechsler)

To describe any internal records kept by the company in respect of the existence or status of signings, sales or installations of theatre systems in the period 2004, 2005 and to the end of the class period in 2006.

Q. 51 (Wechsler)

To produce any internal records kept by the company in respect of the existence or status of signings, sales or installations of theatre systems in the period 2004, 2005 and to the end of the class period in 2006.

Q. 121 (Gamble)

To provide a copy of the spreadsheet prepared by the company in early 2006 quantifying, in terms of labour, material and travel costs, the percentage of the work that needed to be completed for the Q4 2005 installations.

[30] The primary objection to answering these questions was that they are in the nature of discovery. As noted, I do not accept the respondents' more

restrictive approach to what is a proper question at this stage. Applying the "semblance of relevance" test, the issue here is whether the question relates to Imax's revenue recognition for the questioned theatre systems at issue in Q4 2005. I have reviewed each of the refusals in the context of the examination in question. In my view, underlying information concerning the theatre systems in question is potentially relevant as having informed the decisions of Imax management with respect to revenue recognition, and in evaluating whether each of the respondents, including Imax, exercised due diligence. The respondents argued vigorously that, once Imax asserted its reliance on the advice of PwC, this essentially created a "brick wall" for the plaintiffs. The respondents may choose to make that argument in the leave motion, but it does not limit the scope of questioning available to the plaintiffs at this stage.

[31] I order that Questions 75, 76, 110, 111, 130, 146, 147, 148 and 121 are proper questions and shall be answered. Question 50 is in fact an undertaking and shall be answered. Questions 51 and 46 are in my view too broad in terms of the type of document requested and the period of time covered in the question and need not be answered.

3. The Imax Revenue Recognition Policies

The refusals are as follows:

Q. 44 (Wechsler)

If an internal handbook or policy book exists with respect to revenue recognition, to produce same.

Q. 124 (Gamble)

To produce memos written by Ed MacNeil [V.P. Finance and Special Projects] on the impact of EITF 00-21 on Imax revenue recognition policy.

Q. 126 (Gamble)

To provide the amendments made to the written revenue recognition policy after the Delhi investigation report.

Q. 151 (Joyce)

To produce a copy of any memorandum written for circulation by any member of the finance team in December 2005 or prior to the middle of January 2006, on the issue of whether revenue should be recognized on an entire theatre system prior to a completion of each and every aspect of Imax's obligations under a contract with a customer.

[32] All of these questions meet the "semblance of relevance" test and shall be answered. Mr. Copland's affidavit sets out the approach that was followed in accounting for revenue from theatre systems in the prior years and in respect of 2005, and makes specific reference to the company's accounting policies, rules and guidelines. The respondents assert that Imax's restatement of its 2005 financial statements resulted from a decision to revise its accounting policies in 2007. Imax's approach to revenue recognition for its theatre systems is at the core of these proceedings and any internal policies and directions that informed the process would be relevant.

4. The Imax Internal Review of its draft 2005 Form 10-K

Q. 11 (Girvan)

If drafts of the 2005 10-K are still in existence, to provide revisions, if any, as they relate to Imax's accounting practices, its internal controls and its revenue recognition practices.

Q. 99 (Braun)

To advise whether there is a difference between the draft financial statements presented to the Audit Committee on March 1, 2006 and the financial statements released on March 9, 2006 and to produce the draft financial statements.

[33] Both of these questions relate to information that would have been available to the members of the Audit Committee in their deliberations and approval of the Imax 2005 financial statements and 10-K, both of which are alleged to have contained misrepresentations. As such, any drafts that they considered during their review are potentially relevant to the due diligence defence. Questions 11 and 99 shall be answered.

5. The Imax Re-statement process

Q. 60 (Wechsler)

To advise of all the facts and produce copies of any documents provided to PwC between March 2006 and July 2007 in relation to the 2005 transactions.

Q. 61 (Wechsler)

To produce the back-up documentation provided to PwC in relation to the 2005 Kazan, Brampton, McMinnville and Lark installations, between the

issuance of the clean audit opinion in March 2006, and the July 2007 restatement.

Q. 23 (Girvan)

To provide the Minutes of the Board and Audit Committee meetings which considered the SEC's comments on Imax's revenue recognition policy and the possibility of a restatement.

[34] In her examination Ms Coulman testified that during the restatement process PwC was made aware of additional obligations that the company might have around the ten installations in 2005. She also stated that there were facts that they learned subsequent to the signing of the clean audit opinion that could have impacted her assessment of the judgments made by the company. I note that counsel in that examination refused to give an undertaking to advise respecting the additional facts that came to PwC's attention that could have affected their audit opinion, on the grounds that this was not an examination for discovery. While that refusal was not before me in this motion, I refer to Ms Coulman's examination on this point because it is the background to Questions 60 and 61, which are from the examination of Mr. Wechsler.

[35] Question 60 need not be answered. I have reviewed Mr. Steep's explanation in the transcript as to his concern about the question as well as the scope of PwC's review in its initial audit and in connection with the restatement, and I agree that the question as framed is too broad. Question 61 relates to

certain installations referred to by Ms Coulson where she states that PwC became aware of new information. There is a proper foundation for this question and it shall be answered.

[36] With respect to Question 23, the objection was that there might be material in the Minutes of the Board and Audit Committee meetings that contained legal advice and would be privileged. I agree with the respondents' position respecting this question. Question 23 shall be answered, and the respondents are entitled to redact the portions of the minutes that reflect legal advice received by the Board or the Audit Committee.

Conclusion

[37] Questions 71, 70, 56, 55, 75, 76, 110, 111, 130, 146, 147, 148, 50, 124, 126, 151, 11, 99, 61 and 23 from the Refusals & Undertakings Chart listed at Schedule "A" of the Notice of Motion shall be answered.

[38] A telephone conference may be arranged through my office if the parties are unable to agree on the costs of this motion.

van Rensburg J.

DATE: May 6, 2008

TAB 13

CITATION: Robertson v. ProQuest Information and Learning Company, 2011 ONSC 1647
COURT FILE NO.: 03-CV-252945CP / CV-10-8533-00CL
DATE: 20110315

ONTARIO

SUPERIOR COURT OF JUSTICE
(Commercial List)

RE: IN THE MATTER OF THE CO*MPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

- AND -

HEATHER ROBERTSON, Plaintiff

AND:

PROQUEST INFORMATION AND LEARNING COMPANY, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC., Defendants

BEFORE: Pepall J.

COUNSEL: *Kirk Baert*, for the Plaintiff

Peter J. Osborne and *Kate McGrann*, for Canwest Publishing Inc.

Alex Cobb, for the CCAA Applicants

Ashley Taylor and *Maria Konyukhova*, for the Monitor

REASONS FOR DECISION

Overview

[1] On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("*CCAA*") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by

Heather Robertson in her personal capacity and as a representative plaintiff (the "Representative Plaintiff"). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

Facts

[2] The Representative Plaintiff commenced this class proceeding by statement of claim dated July 25, 2003 and the action was case managed by Justice Cullity. He certified the action as a class proceeding on October 21, 2008 which order was subsequently amended on September 15, 2009.

[3] The Representative Plaintiff claimed compensatory damages of $500 million plus punitive and exemplary damages of $250 million against the named defendants, ProQuest Information and Learning LLC, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and CPI for the alleged infringement of copyright and moral rights in certain works owned by class members. She alleged that class members had granted the defendants the limited right to reproduce the class members' works in the print editions of certain newspapers and magazines but that the defendant publishers had proceeded to reproduce, distribute and communicate the works to the public in electronic media operated by them or by third parties.

[4] As set out in the certification order, the class consists of:

> A. All persons who were the authors or creators of original literary works ("Works") which were published in Canada in any newspaper, magazine, periodical, newsletter, or journal (collectively "Print Media") which Print Media have been reproduced, distributed or communicated to the public by telecommunication by, or pursuant to the purported authorization or permission of, one or more of the defendants, through any

electronic database, excluding electronic databases in which only a precise electronic reproduction of the Work or substantial portion thereof is made available (such as PDF and analogous copies) (collectively "Electronic Media"), excluding:

(a) persons who by written document assigned or exclusively licensed all of the copyright in their Works to a defendant, a licensor to a defendant, or any third party; or

(b) persons who by written document granted to a defendant or a licensor to a defendant a license to publish or use their Works in Electronic Media; or

(c) persons who provided Works to a not for profit or non-commercial publisher of Print Media which was licensor to a defendant (including a third party defendant), and where such persons either did not expect or request, or did not receive, financial gain for providing such Works; or

(d) persons who were employees of a defendant or a licensor to a defendant, with respect to any Works created in the course of their employment.

Where the Print Media publication was a Canadian edition of a foreign publication, only Works comprising of the content exclusive to the Canada edition shall qualify for inclusion under this definition.

(Persons included in clause A are thereinafter referred to as "Creators". A "licensor to a defendant" is any party that has purportedly authorized or provided permission to one or more defendants to make Works available in Electronic Media. References to defendants or licensors to defendants include their predecessors and successors in interest)

B. All persons (except a defendant or a licensor to a defendant) to whom a Creator, or an Assignee, assigned, exclusively licensed, granted or transmitted a right to publish or use their Works in Electronic Media.

(Persons included in clause B are hereinafter referred to as "Assignees")

> C. Where a Creator or Assignee is deceased, the personal representatives of the estate of such person unless the date of death of the Creator was on or before December 31, 1950.

[5] As part of the *CCAA* proceedings, I granted a claims procedure order detailing the procedure to be adopted for claims to be made against the LP Entities in the *CCAA* proceedings. On April 12, 2010, the Representative Plaintiff filed a claim for $500 million in respect of the claims advanced against CPI in the action pursuant to the provisions of the claims procedure order. The Monitor was of the view that the claim in the *CCAA* proceedings should be valued at $0 on a preliminary basis.

[6] The Representative Plaintiff's claim was scheduled to be heard by a claims officer appointed pursuant to the terms of the claims procedure order. The claims officer would determine liability and would value the claim for voting purposes in the *CCAA* proceedings.

[7] Prior to the hearing before the claims officer, the Representative Plaintiff and CPI negotiated for approximately two weeks and ultimately agreed to settle the *CCAA* claim pursuant to the terms of a settlement agreement.

[8] When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

[9] Pursuant to section 34 of the *Class Proceedings Act*, the same judge shall hear all motions before the trial of the common issues although another judge may be assigned by the Regional Senior Judge (the "RSJ") in certain circumstances. The action had been stayed as a result of the CCAA proceedings. While I was the supervising CCAA judge, I was also assigned by the RSJ to hear the class proceeding notice and settlement motions.

[10] Class counsel said in his affidavit that given the time constraints in the *CCAA* proceedings, he was of the view that the parties had made reasonable attempts to provide adequate notice of the settlement to the class. It would have been preferable to have provided

more notice, however, given the exigencies of insolvency proceedings and the proposed meeting to vote on the *CCAA* Plan, I was prepared to accept the notice period requested by class counsel and CPI.

[11] In this case, given the hybrid nature of the proceedings, the motion for an order approving notice of the settlement in both the class action proceeding and the *CCAA* proceeding was brought before me as the supervising *CCAA* judge. The notice procedure order required:

1) the Monitor and class counsel to post a copy of the settlement agreement and the notice order on their websites;

2) the Monitor to publish an English version of the approved form of notice letter in the National Post and the Globe and Mail on three consecutive days and a French translation of the approved form of notice letter in La Presse for three consecutive days;

3) distribution of a press release in an approved form by Canadian Newswire Group for dissemination to various media outlets; and

4) the Monitor and class counsel were to maintain toll-free phone numbers and to respond to enquiries and information requests from class members.

[12] The notice order allowed class members to file a notice of appearance on or before a date set forth in the order and if a notice of appearance was delivered, the party could appear in person at the settlement approval motion and any other proceeding in respect of the class proceeding settlement. Any notices of appearance were to be provided to the service list prior to the approval hearing. In fact, no notices of appearance were served.

[13] In brief, the terms of the settlement were that:

a) the *CCAA* claim in the amount of $7.5 million would be allowed for voting and distribution purposes;

b) the Representative Plaintiff undertook to vote the claim in favour of the proposed *CCAA* Plan;

c) the action would be dismissed as against CPI;

d) CPI did not admit liability; and

e) the Representative Plaintiff, in her personal capacity and on behalf of the class and/or class members, would provide a licence and release in respect of the freelance subject works as that term was defined in the settlement agreement.

[14] The claims in the action in respect of CPI would be fully settled but the claims which also involved ProQuest would be preserved. The licence was a non-exclusive licence to reproduce one or more copies of the freelance subject works in electronic media and to authorize others to do the same. The licence excluded the right to licence freelance subject works to ProQuest until such time as the action was resolved against ProQuest, thereby protecting the class members' ability to pursue ProQuest in the action. The settlement did not terminate the lawsuit against the other remaining defendants. Under the *CCAA* Plan, all unsecured creditors, including the class, would be entitled to share on a pro rata basis in a distribution of shares in a new company. The Representative Plaintiff would share pro rata to the extent of the settlement amount with other affected creditors of the LP Entities in the distributions to be made by the LP Entities, if any.

[15] After the notice motion, CPI and the Representative Plaintiff brought a motion to approve the settlement. Evidence was filed showing, among other things, compliance with the claims procedure order. Arguments were made on the process and on the fairness and reasonableness of the settlement.

[16] In her affidavit, Ms. Robertson described why the settlement was fair, reasonable and in the best interests of the class members:

> In light of Canwest's insolvency, I am advised by counsel, and verily believe, that, absent an agreement or successful award in the Canwest Claims Process, the prospect of recovery for the Class

> against Canwest is minimal, at best. However, under the Settlement Agreement, which preserves the claims of the Class as against the remaining defendants in the class proceeding in respect of each of their independent alleged breaches of the class members' rights, as well as its claims as against ProQuest for alleged violations attributable to Canwest content, there is a prospect that members of the Class will receive some form of compensation in respect of their direct claims against Canwest.
>
> Because the Settlement Agreement provides a possible avenue of recovery for the Class, and because it largely preserves the remaining claims of the Class as against the remaining defendants in the class proceeding, I am of the view that the Settlement Agreement represents a reasonable compromise of the Class claim as against Canwest, and is both fair and reasonable in the circumstances of Canwest's insolvency.

[17] In the affidavit filed by class counsel, Anthony Guindon of the law firm Koskie Minsky LLP noted that he was not in a position to ascertain the approximate dollar value of the potential benefit flowing to the class from the potential share in a pro rata distribution of shares in the new corporation. This reflected the unfortunate reality of the *CCAA* process. While a share price of $11.45 was used, he noted that no assurance could be given as to the actual market price that would prevail. In addition, recovery was contingent on the total quantum of proven claims in the claims process. He also described the litigation risks associated with attempting to obtain a lifting of the *CCAA* stay of proceedings. The likelihood of success was stated to be minimal. He also observed the problems associated with collection of any judgment in favour of the Representative Plaintiff. He went on to state:

> ... The Representative Plaintiff, on behalf of the Class, could have elected to challenge Canwest's initial valuation of the Class claim of $0 before a Claims Officer, rather than entering into a negotiated settlement. However, a number of factors militated against the advisability of such a course of action. Most importantly, the claims of the Class in the class proceeding have not been proven, and the Class does not enjoy the benefit of a final judgment as against Canwest. Thus, a hearing before the Claims Officer would necessarily necessitate a finding of liability as against Canwest, in addition to a quantification of the claims of the Class against Canwest.

> ... a negative outcome in a hearing before a Claims Officer could have the effect of jeopardizing the Class claims as against the remaining defendants in the class proceeding. Such a finding would not be binding on a judge seized of a common issues trial in the class proceeding; however, it could have persuasive effect.
>
> Given the likely limited recovery available from Canwest in the Claims Process, it is the view of Class Counsel that a negotiated resolution of the quantification of Class claim as against Canwest is preferable to risking a negative finding of liability in the context of a contested Claims hearing before a Claims Officer.

[18] The Monitor was also involved in the negotiation of the settlement and was also of the view that the settlement agreement was a fair and reasonable resolution for CPI and the LP Entities' stakeholders. The Monitor indicated in its report that the settlement agreement eliminated a large degree of uncertainty from the *CCAA* proceeding and facilitated the approval of the Plan by the requisite majorities of stakeholders. This of course was vital to the successful restructuring of the LP Entities. The Monitor recommended approval of the settlement agreement.

[19] The settlement of the class proceeding action was made prior to the creditors' meeting to vote on the Plan for the LP Entities. The issues of the fees and disbursements of class counsel and the ultimate distribution to class members were left to be dealt with by the class proceedings judge if and when there was a resolution of the action with the remaining defendants.

Discussion

[20] Both motions in respect of the settlement were heard by me but were styled in both the *CCAA* proceedings and the class proceeding.

[21] As noted by Jay A. Swartz and Natasha J. MacParland in their article "*Canwest Publishing – A Tale of Two Plans*"[1]:

> "There have been a number of *CCAA* proceedings in which settlements in respect of class proceedings have been implemented including *McCarthy v. Canadian Red Cross Society, (Re:) Grace Canada Inc., Muscletech Research and Development Inc.,* and *(Re:) Hollinger Inc.* ... The structure and process for notice and approval of the settlement used in the LP Entities restructuring appears to be the most efficient and effective and likely a model for future approvals. Both motions in respect of the Settlement, discussed below, were heard by the *CCAA* judge but were styled in both proceedings." [citations omitted]

(a) Approval

(i) *CCAA* Settlements in General

[22] Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Re Lehndorff General Partner Ltd.,*[2] the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Re Calpine Canada Energy Ltd.*[3]; *Re Air Canada*[4]; and *Re Playdium Entertainment Corp.*[5] To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the

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[1] Annual Review of Insolvency Law, 2010, J.P. Sarra Ed, Carswell, Toronto at page 79.

[2] (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.) at 31.

[3] [2007] A.B.Q.B. 504 at para. 71; leave to appeal dismissed [2007] A.B.C.A. 266 (Alta. C.A.).

[4] (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.).

[5] (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.) at para. 23.

settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Re Air Canada*[6] and *Re Calpine.*[7]

(ii) Class Proceedings Settlement

[23] The power to approve the settlement of a class proceeding is found in section 29 of the *Class Proceedings Act*, 1992[8]. That section states:

> 29(1) A proceeding commenced under this *Act* and a proceeding certified as a class proceeding under this *Act* may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceedings;
>
> (b) a statement of the result of the proceeding; and
>
> (c) a description of any plan for distributing settlement funds.

[24] The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada*[9]. The court must find that in all of the circumstances the

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[6] *Supra.* at para. 9.

[7] *Supra.* at para. 59.

[8] S.O. 1992, C.6.

settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

a) the likelihood of recovery or success at trial;

b) the recommendation and experience of class counsel; and

c) the terms of the settlement.

As such, it is clear that although the *CCAA* and class proceeding tests for approval are not identical, a certain symmetry exists between the two.

[25] A perfect settlement is not required. As stated by Sharpe J. (as he then was) in *Dabbs v. Sun Life Assurance Co. of Canada*[10]:

> Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

[26] Where there is more than one defendant in a class proceeding, the action may be settled against one of the defendants provided that the settlement is fair, reasonable and in the best interests of the class members: *Ontario New Home Warranty Program et al. v. Chevron Chemical et al.*[11]

(iii) The Robertson Settlement

[27] I concluded that the settlement agreement met the tests for approval under the *CCAA* and the *Class Proceedings Act*.

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[9] [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9.

[10] (1998) 40 O.R. (3rd) 429 at para 30.

[11] [1999] O.J. No. 2245 (Ont. S.C.J.) at para. 97.

[28] As a general proposition, settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding. Even though settlements are to be encouraged, fairness and reasonableness are not to be sacrificed in the process.

[29] The presence or absence of opposition to a settlement may sometimes serve as a proxy for reasonableness. This is not invariably so, particularly in a class proceeding settlement. In a class proceeding, the court approval process is designed to provide some protection to absent class members.

[30] In this case, the proposed settlement is supported by the LP Entities, the Representative Plaintiff, and the Monitor. No one, including the non-settling defendants all of whom received notice, opposed the settlement. No class member appeared to oppose the settlement either.

[31] The Representative Plaintiff is a very experienced and sophisticated litigant and has been so recognized by the court. She is a freelance writer having published more than 15 books and having been a regular contributor to Canadian magazines for over 40 years. She has already successfully resolved a similar class proceeding against Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Global Media Publishing Inc. which was settled for $11 million after 13 years of litigation. That proceeding involved allegations quite similar to those advanced in the action before me. In approving the settlement in that case, Justice Cullity described the involvement of the Representative Plaintiff in the class proceeding:

> The Representative Plaintiff, Ms. Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an M.A. from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms. Robertson has been in communication with class members about the litigation since its inception and has obtained funds from

> them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada*[12].

[32] The settlement agreement was recommended by experienced counsel and entered into after serious and considered negotiations between sophisticated parties. The quantum of the class members' claim for voting and distribution purposes, though not identical, was comparable to the settlement in *Robertson v. Thomson Canada*. In approving that settlement, Justice Cullity stated:

> Ms. Robertson's best estimate is that there may be 5,000 to 10,000 members in the class and, on that basis, the gross settlement amount of $11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in the U.S. litigation and, given the risks and likely expense attached to a continuation of the proceeding, does not appear to be out of line. On this question I would, in any event, be very reluctant to second guess the recommendations of experienced class counsel, and their well informed client, who have been involved in all stages of the lengthy litigation.[13]

[33] In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore,

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[12] [2009], O.J. No. 2650 at para. 15.

[13] *Robertson v. Thomson Canada*, [2009] O.J. No. 2650 para. 20.

it was integral to the success of the consolidated plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the CCAA Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

[34] The Representative Plaintiff, Class Counsel and the Monitor were all of the view that the settlement resulted in a fair and reasonable outcome. I agreed with that assessment. The settlement was in the best interests of the class and was also beneficial to the LP Entities and their stakeholders. I therefore granted my approval.

Pepall J.

Released: March 15, 2011

CITATION: Robertson v. ProQuest Information and Learning Company, 2011 ONSC 1647
COURT FILE NO.: 03-CV-252945CP / CV-10-8533-00CL
DATE: 20110315

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

IN THE MATTER OF THE CO*MPANIES' CREDITORS ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

- AND -

HEATHER ROBERTSON,

Plaintiff

AND:

PROQUEST INFORMATION AND LEARNING COMPANY, CEDROM-SNI INC., TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and CANWEST PUBLISHING INC.,

Defendants

REASONS FOR DECISION

Pepall J.

Released: March 15, 2011

TAB 14

1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, [1999] O.J. No. 3572, 103 O.T.C. 161

1999 CarswellOnt 2932, 40 C.P.C. (4th) 151, [1999] O.J. No. 3572, 103 O.T.C. 161

Parsons v. Canadian Red Cross Society

Dianna Lousie Parsons, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish, Elsie Kotyk, Executrix of the Estate of Harry Kotyk, Deceased and Elsie Kotyk, Personally, Plaintiffs and The Canadian Red Cross Society, Her Majesty the Queen in Right of Ontario and the Attorney General of Canada, Defendants

James Kreppner, Barry Issac, Norman Landry, as Executor of the Estate of the Late Serge Landry, Peter Felsing, Donald Milligan, Allan Gruhlke, Jim Love and Pauline Fournier, as Executrix of the Estate of the Late Pierre Fournier, Plaintiffs and The Canadian Red Cross Society, the Attorney General of Canada and Her Majesty the Queen in Right of Ontario, Defendants

Ontario Superior Court of Justice

Winkler J.

Heard: August 19-21, 1999
Judgment: September 22, 1999
Docket: 98-CV-141369, 98-CV-146405

Counsel: *Harvey Strosberg, Q.C.*, *Heather Rumble Peterson* and *Patricia Speight*, for plaintiffs (98-CV-141369).

Bonnie A. Tough and *David Robins*, for plaintiffs (98-CV-146405).

Wendy Matheson and *Jane Bailey*, for Canadian Red Cross Society.

Michèle Smith and *R.F. Horak*, for Her Majesty the Queen in Right of Ontario.

Ivan G. Whitehall, Q.C., *Catherine Moore* and *J.C. Spencer*, for Attorney General of Canada.

Wilson McTavish, Q.C., *Linda Waxman* and *Marian Jacko*, for office of the children's lawyer.

Laurie Redden, for office of the public guardian and trustee.

Beth Symes, for friend of the court, Thalassemia Foundation of Canada.

William P. Dermody, for intervenors, Hubert Fullarton and Tracey Goegan.

L. Craig Brown, for friend of the court, Hepatitis C Society of Canada.

Pierre R. Lavigne, for friend of the court, Dominique Honhon.

Bruce Lemer, for friend of the court, Anita Endean.

Elizabeth M. Stewart, for Provinces and Territories other than British Columbia and Quebec.

Janice E. Blackburn and *James P. Thomson*, for friend of the court, Canadian Hemophilia Society.

Subject: Public; Civil Practice and Procedure; Torts

Practice --- Disposition without trial — Settlement — General

Two class proceedings were commenced as result of contamination of Canadian blood supply with infectious viruses during 1980s — During class periods, sole supplier and distributor of whole blood and blood products in Canada was Canadian Red Cross Society — Viral infection at centre of proceedings was Hepatitis C — Claims of plaintiffs were based in negligence, breach of fiduciary duty and strict liability in tort — Motion was brought for court approval of comprehensive settlement package — Settlement agreement created plans to compensate persons infected with Hepatitis C, their secondarily infected spouses and children, and their other family members — Agreement was to be funded by payment by federal, provincial and territorial governments into trust fund — Motion granted — Settlement to be amended to apply entitlement provisions in hemophiliac plan to thalassemia sub-class, to provide sub-class with benefit of lesser burden of proof — To be approved, settlement must be fair, reasonable and in best interests of class as whole — That settlement is less than ideal for any particular class member is not bar to approval for class as whole — Provision in settlement for periodic subsequent claims should class member's condition worsen addressed concern with respect to uncertainty and unfairness of once-and-for-all settlement — Substantial risk that society would have no meaningful assets available to satisfy judgment if actions proceeded to trial — Real question existed as to liability of Crown defendants — Litigation would be lengthy, protracted and expensive — No suggestion of bad faith or collusion tainted settlement — There was adequate communication between class counsel and class members regarding settlement — Global settlement represented reasonable settlement when significant and real risks of litigation were taken into account — Settlement did not provide for fair and reasonable distribution among class members — Under agreement, opt-out claimants who were successful in individual litigation were to have any awards satisfied out of settlement fund — Provision raised risk of inequity as it gave opt-out claimants potential for preferential treatment in respect of access to fund — Opt-out provision to be deleted and replaced with provision that, in event of successful litigation by opt-out claimant, defendants were entitled to indemnification from fund only to extent that claimant would have been entitled to claim from fund had claimant remained in class — Remainder of distribution scheme was fair and reasonable — Fund was sufficient to provide benefits under settlement — Provision that mandated reversion of surplus of plans to defendants was not inappropriate if question of proper application of surplus is left up to administrator of fund — Proposed changes were not material — Settlement approved with required modifications.

Practice --- Parties — Representative or class actions — Procedural requirements

Two class proceedings were commenced as result of contamination of Canadian blood supply with infectious viruses during 1980s — During class periods, sole supplier and distributor of whole blood and blood products in Canada was Canadian Red Cross Society — Viral infection at centre of proceedings was Hepatitis C — Claims of plaintiffs were based in negligence, breach of fiduciary duty and strict liability in tort — Motion was brought for court approval of comprehensive settlement package — Settlement agreement created plans to compensate persons infected with Hepatitis C, their secondarily infected spouses and children and their other family members — Agreement was to be funded by payment by federal, provincial and territorial governments into trust fund — Motion granted — Settlement to be amended to apply

entitlement provisions in hemophiliac plan to thalassemia sub-class, to provide sub-class with benefit of lesser burden of proof — To be approved, settlement must be fair, reasonable and in best interests of class as whole — That settlement is less than ideal for any particular class member is not bar to approval for class as whole — Provision in settlement for periodic subsequent claims should class member's condition worsen addressed concern with respect to uncertainty and unfairness of once-and-for-all settlement — Substantial risk that society would have no meaningful assets available to satisfy judgment if actions proceeded to trial — Real question existed as to liability of Crown defendants — Litigation would be lengthy, protracted and expensive — No suggestion of bad faith or collusion tainted settlement — There was adequate communication between class counsel and class members regarding settlement — Global settlement represented reasonable settlement when significant and real risks of litigation were taken into account — Settlement did not provide for fair and reasonable distribution among class members — Under agreement, opt-out claimants who were successful in individual litigation were to have any awards satisfied out of settlement fund — Provision raised risk of inequity as it gave opt-out claimants potential for preferential treatment in respect of access to fund — Opt-out provision to be deleted and replaced with provision that, in event of successful litigation by opt-out claimant, defendants were entitled to indemnification from fund only to extent that claimant would have been entitled to claim from fund had claimant remained in class — Remainder of distribution scheme was fair and reasonable — Fund was sufficient to provide benefits under settlement — Provision that mandated reversion of surplus of plans to defendants was not inappropriate if question of proper application of surplus is left up to administrator of fund — Proposed changes were not material — Settlement approved with required modifications.

Cases considered by *Winkler J.*:

Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229, 3 C.C.L.T. 225, 83 D.L.R. (3d) 452, 19 N.R. 50, [1978] 1 W.W.R. 577, 8 A.R. 182 (S.C.C.) — considered

Bisignano v. La Corporation Instrumentarium Inc. (September 1, 1999), Doc. 22404/96 (Ont. S.C.J.) — referred to

Dabbs v. Sun Life Assurance Co. of Canada (February 24, 1998), Doc. Toronto 96-CT-022862 (Ont. Gen. Div.) — applied

Dabbs v. Sun Life Assurance Co. of Canada, [1998] I.L.R. I-3575, 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, 5 C.C.L.I. (3d) 18 (Ont. Gen. Div.) — applied

Dabbs v. Sun Life Assurance Co. of Canada (1998), 165 D.L.R. (4th) 482, 113 O.A.C. 307, [1999] I.L.R. I-3629, 41 O.R. (3d) 97, 7 C.C.L.I. (3d) 38, 27 C.P.C. (4th) 243 (Ont. C.A.) — applied

Dabbs v. Sun Life Assurance Co. of Canada (1998), 235 N.R. 390 (note), 118 O.A.C. 399 (note) (S.C.C.) — applied

Haney Iron Works Ltd. v. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565, 9 C.C.L.I. (3d) 253 (B.C. S.C.) — referred to

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245, 25 O.R. (3d) 331 (Ont. Gen. Div.) — considered

Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 40 C.P.C. (3d) 263, 129 D.L.R. (4th) 110, 25 O.R. (3d) 331 at 347 (Ont. Gen. Div.) — considered

Ontario New Home Warranty Program v. Chevron Chemical Co. (June 17, 1999), Doc. 22487/96 (Ont. S.C.J.) — applied

Sawatzky v. Société Chirurgicale Instrumentarium Inc. (August 4, 1999), Doc. Vancouver C954740 (B.C. S.C.) — referred to

Statutes considered:

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — considered

s. 5(2) — considered

s. 8(3) — considered

s. 26(4) — considered

s. 26(6) — considered

s. 29(2) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

MOTION for approval of settlement in two companion class proceedings.

***Winkler J.*:**

Nature of the Motion

1 This is a motion for approval of a settlement in two companion class proceedings commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the "Transfused Action" and the "Hemophiliac Action," brought on behalf of persons infected by Hepatitis-C from the Canadian blood supply. The Transfused Action was certified as a class proceeding by order of this court on June 25, 1998, as later amended on May 11, 1999. On the latter date, an order was also issued certifying the Hemophiliac Action. There are concurrent class proceedings in respect of the same issues before the courts in Quebec and British Columbia. The Ontario proceedings apply to all persons in Canada who are within the class definition with the exception of any person who is included in the proceedings in Quebec and British Columbia. The motion before this court concerns a Pan-Canadian agreement intended to effect a national settlement, thus bringing to an end this aspect to the blood tragedy. Settlement approval motions similar to the instant proceeding have been contemporaneously heard by courts in Quebec and British Columbia with a view to bringing finality to the court proceedings across the country.

The Parties

2 The plaintiff class in the Transfused Action are persons who were infected with Hepatitis C from blood transfusions between January 1, 1986 to July 1, 1990. The plaintiff class in the Hemophiliac Action are persons infected with Hepatitis C from the taking of blood or blood products during the same time period.

3 The defendants in the Ontario actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario, and the Attorney General of Canada. The Ontario classes are national in scope. Therefore, the other

Provincial and Territorial Governments of Canada, with the exception of Quebec and British Columbia, have moved to be included in the Ontario actions as defendants but only if the settlement is approved.

4 The court has granted intervenor status to a number of individuals, organizations and public bodies, namely, Hubert Fullarton and Tracy Goegan, the Canadian Hemophilia Society, the Thalassemia Foundation of Canada, the Hepatitis C Society of Canada, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee of Ontario.

5 Pursuant to an order of this court, PricewaterhouseCoopers received and presented to the court over 80 written objections to the settlement from individuals afflicted with Hepatitis-C. In addition, 11 of the objectors appeared at the hearing of the motion to proffer evidence as to their reasons for objecting to the settlement.

6 The approval of the settlement before the court is supported by class counsel and the Ontario and Federal Crown defendants. In addition to these parties, the Provincial and Territorial governments who seek to be included if the settlement is approved, and the intervenors, the Canadian Hemophilia Society, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee made submissions in support of approval of the settlement. The Canadian Red Cross Society ("CRCS") appeared, but did not participate, all actions against it having been stayed by order of Mr. Justice Blair dated July 28, 1999, pursuant to a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. The other intervenors and individual objectors voiced concerns about the settlement and variously requested that the court either reject the settlement or vary some of its terms in the interest of fairness.

Background

7 Both actions were commenced as a result of the contamination of the Canadian blood supply with infectious viruses during the 1980s. The background facts are set out in the pleadings and the numerous affidavits forming the record on this motion. The following is a brief summary.

8 The national blood supply system in Canada was developed during World War II by the CRCS. Following WWII, the CRCS was asked to carry on with the operation of this national system, and did so as part of its voluntary activities without significant financial support from any government. As a result of its experience and stewardship of system, the CRCS had a virtual monopoly on the collection and distribution of blood and blood products in Canada.

9 Over time the demand for blood grew and Canada turned to a universal health care system. Because of these developments, the CRCS requested financial assistance from the provincial and territorial governments. The governments, in turn, demanded greater oversight over expenditures. This led to the formation of the Canadian Blood Committee which was composed of representatives of the federal, provincial and territorial governments. The CBC became operational in the summer of 1982. Other than this overseer committee, there was no direct governmental regulation of the blood supply in Canada.

10 The 1970s and 80s were characterized medically by a number of viral infection related problems stemming from contaminated blood supplies. These included hepatitis and AIDS. The defined classes in these two class actions, however, are circumscribed by the time period beginning January 1, 1986 and ending July 1, 1990. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The viral infection at the center of these proceedings is now known as Hepatitis C.

11 Hepatitis is an inflammation of the liver that can be caused by various infectious agents, including contaminated blood and blood products. The inflammation consists of certain types of cells that infiltrate the tissue and produce by-

products called cytokines or, alternatively, produce antibodies which damage liver cells and ultimately cause them to die.

12 One method of transmission of hepatitis is through blood transfusions. Indeed, it was common to contract hepatitis through blood transfusions. However, due to the limited knowledge of the effects of contracting hepatitis, the risk was considered acceptable in view of the alternative of no transfusion which would be, in many cases, death.

13 As knowledge of the disease evolved, it was discovered that there were different strains of hepatitis. The strains identified as Hepatitis A ("HAV") and Hepatitis B ("HBV") were known to the medical community for some time. HAV is spread through the oral-fecal route and is rarely fatal. HBV is blood-borne and may also be sexually transmitted. It can produce violent illness for a prolonged period in its acute phase and may result in death. However, most people infected with HBV eliminate the virus from their system, although they continue to produce antibodies for the rest of their lives.

14 During the late 1960s, an antigen associated with HBV was identified. This discovery led to the development of a test to identify donated blood contaminated with HBV. In 1972, the CRCS implemented this test to screen blood donations. It soon became apparent that post-transfusion hepatitis continued to occur, although much less frequently. In 1974, the existence of a third form of viral hepatitis, later referred to as Non-A Non-B Hepatitis ("NANBH") was postulated.

15 This third viral form of hepatitis became identified as Hepatitis C ("HCV") in 1988. Its particular features are as follows:

> (a) transmission through the blood supply if HCV infected donors are unaware of their infected condition and if there is no, or no effective, donor screening;
>
> (b) an incubation period of 15 to 150 days;
>
> (c) a long latency period during which a person infected may transmit the virus to others through blood and blood products, or sexually, or from mother to fetus; and
>
> (d) no known cure.

16 The claims in these actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after a "surrogate" test for HCV became available and had been put into widespread use in the United States.

17 In a surrogate test a donor blood sample is tested for the presence of substances which are associated with the disease. The surrogate test is an indirect method of identifying in a blood sample the likelihood of an infection that cannot be identified directly because no specific test exists. During the class period, there were two surrogate tests capable of being used to identify the blood donors suspected of being infected with HCV, namely, a test to measure the ALT enzyme in a donor's blood and a test to detect the anti-HBc, a marker of HBV, in the blood.

18 The ALT enzyme test was useful because it highlights inflammation of the liver. There is an increased level of ALT enzymes in the blood when a liver is inflamed. The test is not specific for any one liver disease but rather indicates inflammation from any cause. Elevated ALT enzymes are a marker of liver dysfunction which is often associated with HCV.

19 The anti-HBc test detects exposure to HBV and is relevant to the detection of HCV because of the assumption that a person exposed to HBV is more likely than normal to have been exposed to HCV, since both viruses are blood-borne and because the populations with higher rates of seroprevalence were believed to be similar.

20 The surrogate tests were subjected to various studies in the United States. Among other aspects, the studies analyzed the efficacy of each test in preventing NANBH post-transfusion infection and the extent to which the rejection of blood donations would be increased. The early results of the studies did not persuade the agencies responsible for blood banks in the U.S. to implement surrogate testing as a matter of course. However, certain individuals, including Dr. Harvey Alter, a leading U.S. expert on HCV, began a campaign to have the U.S. blood agencies change their policies. In consequence, in April 1986 the largest U.S. blood agency decided that both surrogate tests should be implemented, and further, that the use of the tests would become a requirement of the agency's standard accreditation program in the future. This effectively made surrogate testing the national standard in the U.S. and by August 1, 1986, all or virtually all volunteer blood banks in the U.S. screened blood donors by using the ALT and anti-HBc tests.

21 This course was not followed in Canada. Although there was some debate amongst the doctors involved with the CRCS, surrogate testing was not adopted. Rather, in 1984 a meeting was held at the CRCS during which a multi-centre study was proposed. The purpose of the study was to determine the incidence of NANBH in Canada. The CRCS blood centres proposed to take part in the study were those in Toronto, Montreal, Ottawa, Edmonton and Vancouver.

22 Prior to the 1984 meeting however, Dr. Victor Feinman of Mount Sinai Hospital had already begun a study to determine the incidence of NANBH in those who had received blood transfusions. This study had a significant limitation in that it did not measure the effectiveness of surrogate testing. Although the limitation was known to the CRCS, the medical directors agreed at their meeting on March 29-30, 1984 to review Dr. Feinman's research to determine whether the proposed CRCS multi-centre study was still required. Ultimately, the CRCS did not conduct the multi-centre study.

23 The CRCS was aware of the American decision to implement surrogate testing in 1986 but opted instead to await a full assessment of the results of the Dr. Feinman study and the impact of testing for the Human-Immunodeficiency Virus ("HIV") and "self-designation" as possible surrogates to screen for NANBH.

24 This decision was criticized by Dr. Alter. In an article published in the *Medical Post* in February 1988, Dr. Alter was quoted as stating that:

> while the use of surrogate markers is far from ideal, the lack of any specific test to identify [NANBH], coupled with the serious chronic consequences of the disease, makes the need for these surrogate tests essential.

25 The CRCS never implemented surrogate testing. In late 1988, HCV was isolated. The Chiron Corporation developed a test for anti-HCV for use by blood banks. In March 1990, the CRCS blood centres began implementing the anti-HCV test, and by June 30, 1990, all centres had implemented the test. Hence the class definitions stipulated in the two certification orders before this court, covers the period between January 1, 1986 and July 1, 1990, which corresponds to the interval between the widespread use of surrogate testing in the U.S. and the universal adoption of the Chiron HCV test in Canada. The classes are described fully below.

The Claims

26 It is alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidence of HCV infection from contaminated blood would have been reduced by as much as 75% during the class period. Consequently, they bring the actions on behalf of classes described as the Ontario Transfused Class and the Ontario Hemophiliac Class. The plaintiffs assert claims based in negligence, breach of fiduciary duty and strict liability in tort as against all of the defendants.

The Classes

27 The Ontario Transfused Class is described as:

(a) all persons who received blood collected by the CRCS contaminated with HCV during the Class Period and who are or were infected for the first time with HCV and who are:

(i) presently or formerly resident in Ontario and receive blood in Ontario and who are or were infected with post-transfusion HCV;

(ii) resident in Ontario and received blood in any other Province or Territory of Canada other than Quebec and who are or were infected with post-transfusion HCV;

(iii) resident elsewhere in Canada and received blood in Canada, other than in the Provinces of British Columbia and Quebec, and who are or were infected with post-transfusion HCV;

(iv) resident outside Canada and received blood in any Province or Territory of Canada, other than in the Province of Quebec, and who are or were infected with post-transfusion HCV; and

(v) resident anywhere and received blood in Canada and who are or were infected with post-transfusion HCV and who are not included as class members in the British Columbia Transfused Class Action or the Quebec Transfused Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to in subparagraph (a) or (b) who is or was infected with HCV by such person.

28 The Ontario Hemophiliac Class is described as:

(a) all persons who have or had a congenital clotting factor defect or deficiency, including a defect or deficiency in Factors V, VII, VIII, IX, XI, XII, XIII or von Willebrand factor, and who received or took Blood (as defined in Section 1.01 of the Hemophiliac HCV Plan) during the Class Period and who are:

(i) presently or formerly a resident in Ontario and received or took Blood in Ontario and who are or were infected with HCV;

(ii) resident in Ontario and received or took Blood in any other Province or Territory of Canada other than Quebec and who are or were infected with HCV;

(iii) resident elsewhere in Canada and received or took Blood in Canada other than in the Provinces of British Columbia and Quebec. and who are or were infected with HCV;

(iv) resident outside Canada and received or took Blood in any Province or Territory in Canada, other than in the Province of Quebec, and who are or were infected with HCV; and

(v) resident anywhere and received or took Blood in Canada and who are not included as class members in the British Columbia Hemophiliac Class Action or the Quebec Hemophiliac Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to subparagraph (a) or (b) who is or was infected with HCV by such person.

29 In addition in each of the actions, there is a "Family" class described, in the Ontario Transfused Class, as follows:

(a) the Spouse, child, grandchild, parent, grandparent or sibling of an Ontario Transfused Class Member;

(b) the spouse of a child, grandchild, parent or grandparent of an Ontario Transfused Class Member;

(c) a former Spouse of an Ontario Transfused Class Member;

(d) a child or other lineal descendant of a grandchild of an Ontario Transfused Class Member;

(e) a person of the opposite sex to an Ontario Transfused Class Member who cohabitated for a period of at least one year with that Class Member immediately before his or her death;

(f) a person of the opposite sex to an Ontario Transfused Class Member who was cohabitating with that Class Member at the date of his or her death and to whom that Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; and

(g) any other person to whom an Ontario Transfused Class Member was providing support for a period of at least three years immediately prior to his or her death.

There is a similarly described Family Class in the Hemophiliac Action.

The Proposed Settlement

30 The parties have presented a comprehensive package to the court. Not only does it pertain to these actions, but it is also intended to be a Pan-Canadian agreement to settle the simultaneous class proceedings before the courts in Quebec and British Columbia. The settlement will not become final and binding until it is approved by courts in all three provinces. It consists of a Settlement Agreement, a Funding Agreement and Plans for distribution of the settlement funds in the Transfused Action and the Hemophiliac Action.

31 The Settlement Agreement creates the following two Plans:

(1) the Transfused HCV Plan to compensate persons who are or were infected with HCV through a blood transfusion received in Canada in the Class Period, their secondarily-infected Spouses and children and their other family members; and

(2) the Hemophiliac HCV Plan to compensate hemophiliacs who received or took blood or blood products in Canada in the Class Period and who are or were infected with HCV, their secondarily-infected Spouses and children and their other family members.

32 To fund the Agreement, the federal, provincial and territorial governments have promised to pay the settlement amount of $1,118,000,000 plus interest accruing from April 1, 1998. This will total approximately $1,207,000,000 as of September 30, 1999.

33 The Funding Agreement contemplates the creation of a Trust Fund on the following basis:

(i) a payment by the Federal Government to the Trust Fund, on the date when the last judgment or order approving the settlement of the Class Actions becomes final, of 8/11ths of the settlement amount, being the sum of approximately $877,818,181, subject to adjustments plus interest accruing after September 30, 1999 to the date of payment;

and

(ii) a promise by each Provincial and Territorial Government to pay a portion of its share of the 3/11ths of the unpaid balance of the settlement amount as may be requested from time to time until the outstanding unpaid balance of the settlement amount together with interest accruing has been paid in full.

34 The Governments have agreed that no income taxes will be payable on the income earned by the Trust, thereby adding, according to the calculations submitted to the court, a present value of about $357,000,000 to the settlement amount.

35 The Agreement provides that the following claims and expenses will be paid from the Trust Fund:

(a) persons who qualify in accordance with the provisions of the Transfused HCV Plan;

(b) persons who qualify in accordance with the provisions of the Hemophiliac HCV Plan;

(c) spouses and children secondarily-infected with HIV to a maximum of 240 who qualify pursuant to the Program established by the Governments (which is not subject to Court approval);

(d) final judgments or Court approved settlements payable by any FPT Government to a Class Member or Family Class Member who opts out of one of the Class Actions or is not bound by the provisions of the Agreement or a person who claims over or brings a third-party claim in respect of the Class Member's receiving or taking of blood or blood products in Canada in the Class Period and his or her infection with HCV, plus one-third of Court-approved defence costs;

(e) subject to the Courts' approval, the costs of administering the Plans, including the costs of the persons hereafter enumerated to be appointed to perform various functions under the Agreement;

(f) subject to the Courts' approval, the costs of administering the HIV Program, which Program administration costs, in the aggregate, may not exceed $2,000,000; and

(g) subject to Court approval, fees, disbursements, costs, GST and other applicable taxes of Class Action Counsel.

Class Members Surviving as of January 1, 1999

36 Other than the payments to the HIV sufferers, which I will deal with in greater detail below, the plans contemplate that compensation to the class members who were alive as of January 1, 1999, will be paid according to the severity of the medical condition of each class member. All class members who qualify as HCV infected persons are entitled to a fixed payment as compensation for pain and suffering and loss of amenities of life based upon the stage of his or her medical condition at the time of qualification under the Plan. However, the class member will be subsequently entitled to additional compensation if and when his or her medical condition deteriorates to a medical condition described at a higher compensation level. This compensation ranges from a single payment of $10,000, for a person who has cleared the disease and only carries the HCV antibody, to payments totaling $225,000 for a person who has decompensation of the liver or a similar medical condition.

37 The compensation ranges are described in the Agreement as "Levels." In addition to the payments for loss of amenities, class members with conditions described as being at compensation Level 3 or a higher compensation Level (4 or above), and whose HCV caused loss of income or inability to perform his or her household duties, will be entitled to

compensation for loss of income or loss of services in the home.

38 The levels, and attendant compensation, for class members are described as follows:

(i) Level 1

Qualification	Compensation
A blood test demonstrates that the HCV antibody is present in the blood of a class member.	A lump sum payment of $10,000 plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(ii) Level 2

Qualification	Compensation
A polymerase chain reaction test (PCR) demonstrates that HCV is present in the blood of a class member.	Cumulative compensation of $30,000 which comprises the $10,000 payment at level 1, plus a payment of $15,000 immediately and another $5,000 when the court determines that the Fund is sufficient to do so, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iii) Level 3

Qualification	Compensation
If a class member develops non-bridging fibrosis, or receives compensable drug therapy (i.e. Interferon or Ribavirin), or meets a protocol for HCV compensable treatment regardless of whether the treatment is taken, then the class member qualifies for Level 3 benefits.	Option 1 — $60,000 comprised of the level 1 and 2 payments plus an additional $30,000 Option 2 — $30,000 from the Level 1 and 2 benefits, and if the additional $30,000 from Option 1 is waived, compensation for loss of income or loss of services in the home, subject to a threshold qualification. In addition, at this level, the class member is entitled to an additional $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iv) Level 4

Qualification	Compensation
If a class member develops bridging fibrosis, he or she qualifies as a Level 4 claimant	There is no further fixed payment beyond that of Level 3 at this level. In addition to those previously defined benefits, the claimant is entitled to compensation for loss of income

	or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(v) Level 5

Qualification	Compensation
A class member who develops (a) cirrhosis; (b) unresponsive porphyria cutanea tarda which is causing significant disfigurement and disability; (c) unresponsive thrombocytopenia (low platelets) which result in certain other conditions; or (d) glomerulonephritis not requiring dialysis, he or she qualifies as a Level 5 claimant.	$125,000 which consists of the prior $60,000, if the claimant elected Option 1 at Level 3, plus an additional $65,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(vi) Level 6

Qualification	Compensation
If a class member receives a liver transplant, or develops: (a) decompensation of the liver; (b) hepatocellular cancer; (c) B-cell lymphoma; (d) symptomatic mixed cryoglobullinemia; (e) glomerulonephritis requiring dialysis; or (f) renal failure, he or or she qualifies as a Level 6 claimant.	$225,000 which consists of the $125,000 available at the prior levels plus an additional $100,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses. The claimant is also entitled to reimbursement for costs of care up to $50,000 per year.

39 There are some significant "holdbacks" of compensation at certain levels. As set out in the table above, a claimant who is entitled to the $20,000 compensation payment at level 2 will initially be paid $15,000 while $5,000 will be held back in the Fund. If satisfied that there is sufficient money in the Fund, the Courts may then declare that the holdback shall be removed in accordance with Section 10.01(1)(i) of the Agreement and Section 7.03 of the Plans. Claimants with monies held back will then receive the holdback amount with interest at the prime rate from the date they first became entitled to the payment at Level 2. In addition, any claimant that qualifies for income replacement at Level 4 or higher will be subjected to a holdback of 30% of the compensation amount. This holdback may be removed, and the compensation restored, on the same terms as the Level 2 payment holdback.

40 There is a further limitation with respect to income, namely, that the maximum amount subject to replacement has been set at $75,000 annually. Again this limitation is subject to the court's review. The court may increase the limit on income, after the holdbacks have been removed, and the held benefits restored, if the Fund contains sufficient assets to do so.

41 Payment of loss of income is made on a net basis after deductions for income tax that would have been payable on earned income and after deduction of all collateral benefits received by the Class Member. Loss of income payments cease upon a Class Member reaching age 65. A claim for the loss of services in the home may be made for the lifetime of

the Class Member.

Class Members Dying Before January 1, 1999

42 If a Class Member who died before January 1, 1999, would have qualified as a HCV infected person but for the death, and if his or her death was caused by HCV, compensation will be paid on the following terms:

(a) the estate will be entitled to receive reimbursement for uninsured funeral expenses to a maximum of $5,000 and a fixed payment of $50,000, while approved family members will be entitled to compensation for loss of the deceased's guidance, care and companionship on the scale set out in the chart at paragraph 82 below and approved defendants may be entitled to compensation for their loss of support from the deceased or for the loss of the deceased's services in the home ("Option 1"); or

(b) at the joint election of the estate and the approved family members and dependants of the deceased, the estate will be entitled to reimbursement for uninsured funeral expenses to a maximum of $5,000, and the estate and the approved family members and dependants will be jointly entitled to compensation of $120,000 in full settlement of all of their claims ("Option 2").

43 Under the Plans when a deceased HCV infected person's death is caused by HCV, the approved dependants may be entitled to claim for loss of support until such time as the deceased would have reached age 65 but for his death.

44 Payments for loss of support are made on a net basis after deduction of 30% for the personal living expenses of the deceased and after deduction of any pension benefits from CPP received by the dependants.

45 The same or similar holdbacks or limits will initially be imposed on the claim by dependants for loss of support under the Plans as are imposed on a loss of income claim. The $75,000 cap on pre-claim gross income will be applied in the calculation of support and only 70% of the annual loss of support will be paid. If the courts determine that the Trust Fund is sufficient and vary or remove the holdbacks or limits, the dependants will receive the holdbacks, or the portion the courts direct, with interest from the time when loss of support was calculated subject to the limit.

46 Failing agreement among the approved dependants on the allocation of loss of support between them, the Administrator will allocate loss of support based on the extent of support received by each of the dependants prior to the death of the HCV infected person.

Class Members Cross-Infected with HIV

47 Notwithstanding any of the provisions of the Hemophiliac HCV Plan, a primarily-infected hemophiliac who is also infected with HIV may elect to be paid $50,000 in full satisfaction of all of his or her claims and those of his or her family members and dependants.

48 Persons infected with HCV and secondarily-infected with HIV who qualify under a Plan (or, where the person is deceased, the estate and his or her approved family members and dependants) may not receive compensation under the Plan until entitlement exceeds the $240,000 entitlement under the Program after which they will be entitled to receive any compensation payable under the Plan in excess of $240,000.

49 Under the Hemophiliac HCV Plan, the estate, family members and dependants of a primarily-infected hemophiliac who was cross-infected with HIV and who died before January 1, 1999 may elect to receive a payment of $72,000 in full satisfaction of their claims.

The Family Class Claimants

50 Each approved family class member of a qualified HCV infected person whose death was caused by HCV is entitled to be paid the amount set out below for loss of the deceased's guidance, care and companionship:

Relationship	Compensation
Spouse	$25,000
Child under 21 at time of death of class member	$15,000
Child over 21 at time of death of class member	$5,000
Parent or sibling	$5,000
Grandparent or Grandchild	$500

51 If a loss of support claim is not payable in respect of the death of a HCV infected person whose death was caused by his or her infection with HCV, but the approved dependants resided with that person at the time of the death, then these dependants are entitled to be compensated for the loss of any services that the HCV infected person provided in the home at the rate of $12 per hour to a maximum of 20 hours per week.

52 The Agreement and/or the Plans also provide that:

(a) all compensation payments to claimants who live in Canada will be tax free;

(b) compensation payments will be indexed annually to protect against inflation;

(c) compensation payments other than payments for loss of income will not affect social benefits currently being received by claimants;

(d) life insurance payments received by or on behalf of claimants will not be taken into account for any purposes whatsoever under the Plans; and

(e) no subrogation payments will be paid directly or indirectly.

The Funding Calculations

53 Typically in settlements in personal injury cases, where payments are to be made on a periodic basis over an extended period of time, lump sum amounts are set aside to fund the extended liabilities. The amount set aside is based on a calculation which determines the "present value" of the liability. The present value is the amount needed immediately to produce payments in the agreed value over the agreed time. This calculation requires factoring in the effects of inflation, the return on the investment of the lump sum amount and any income or other taxes which might have to be paid on the award or the income it generates. Dealing with this issue in a single victim case may be relatively straightforward. Making an accurate determination in a class proceeding with a multitude of claimants suffering a broad range of damages is a complex matter.

54 Class counsel retained the actuarial firm of Eckler Partners Ltd. to calculate the present value of the liabilities for the benefits set out in the settlement. The calculations performed by Eckler were based on a natural history model of HCV constructed by the Canadian Association for the Study of the Liver ("CASL") at the request of the parties. As stated in the Eckler report at p.3, "the results from the [CASL] study form the basis of our assumptions regarding the develop-

ment of the various medical outcomes." However, the Eckler report also notes that in instances where the study was lacking in information, certain extensions to some of the probabilities were supplied by Dr. Murray Krahn who led the study. In certain other situations, additional or alternative assumptions were provided by class counsel.

55 The class in the Transfused Action is comprised of those persons who received blood transfusions during the class period and are either still surviving or have died from a HCV related cause. The CASL study indicates that the probable number of persons infected with HCV through blood transfusion in the class period, the "cohort" as it is referred to in the study, is 15,707 persons. The study also estimates the rates of survival of each infected person. From these estimates, Eckler projects that the cohort as of January 1, 1999 is 8,104 persons. Of those who have died in the intervening time, 76 are projected to be HCV related deaths and thus eligible for the death benefits under the settlement.

56 In the case of the Hemophiliac class, the added factor of cross-infection with HIV, and the provisions in the plan dealing with this factor, require some additional considerations. Eckler was asked to make the following assumptions based primarily on the evidence of Dr. Irwin Walker:

> (a) the Hemophiliac cohort size is approximately 1645 persons
>
> (b) 15 singularly infected and 340 co-infected members of this cohort have died prior to January 1, 1999; the 15 singularly infected and 15 of those co-infected will establish HCV as the cause of death and claim under the regular death provisions (but there is no $120,000 option in this plan); the remaining 325 co-infected will take the $72,000 option.
>
> (c) a further 300 co-infected members are alive at January 1, 1999; of these, 80%, i.e. 240, will take the $50,000 option;
>
> (d) 990 singularly infected hemophiliacs are alive at January 1, 1999
>
> (e) the remaining 60 co-infected and the 990 singularly infected hemophiliacs will claim under the regular provisions and should be modeled in the same way as the transfused persons, i.e. apply the same age and sex profiles, and the same medical, mortality and other assumptions as for the transfused group, except that the 60 co-infected claimants will not have any losses in respect of income.

57 Because of the structure of this agreement, Eckler was not required to consider the impact of income or other taxes on the investment returns available from the Fund. With respect to the rate of growth of the Fund, Eckler states at p. 10 that:

> A precise present value calculation would require a formula incorporating the gross rate of interest and the rate of inflation as separate parameters. However, virtually the same result will flow from a simpler formula where the future payments are discounted at a net rate equal to the excess of the gross rate of interest over the assumed rate of inflation.

Eckler calculates the annual rate of growth of the Fund will be 3.4% per year on this basis. This is referred to as the "net discount rate."

58 There is one other calculation that is worthy of particular note. In determining the requirements to fund the income replacement benefits set out in the settlement, Eckler used the average industrial aggregate earnings rate in Canada estimated for 1999. From this figure, income taxes and other ordinary deductions were made to arrive at a "pre-claim net income." Then an assumption is made that the class members claiming income compensation will have other earnings

post-claim that will average 40% of the pre-claim amount. The 60% remaining loss, in dollars expressed as $14,500, multiplied by the number of expected claimants, is the amount for which funding is required. Eckler points out candidly at p. 20 that:

> [in regard to the assumed average of Post-claim Net Income]...we should bring to your attention that without any real choice, the foregoing assumed level of 40% was still based to a large extent on anecdotal input and out intuitive judgement on this matter rather than on rigourous scientific studies which are simply not available at this time.

There are other assumptions and estimates which will be dealt with in greater detail below.

59 The Eckler conclusion is that if the settlement benefits, including holdbacks, and the other liabilities were to be paid out of the Fund, there is a present value deficit of $58,533,000. Prior to the payment of holdbacks, the Fund would have a surplus of $34,173,000.

The Thalassemia Victims

60 Prior to analyzing the settlement, I turn to the concerns advanced by The Thalassemia Foundation of Canada. The organization raises the objection that the plan contains a fundamental unfairness as it relates to claims requirements for members of the class who suffer from Thalassemia.

61 Thalassemia, also known as Mediterranean Anemia or Cooley's Anemia, is an inherited form of anemia in which affected individuals are unable to make normal hemoglobin, the oxygen carrying protein of the red blood cell. Mutations of the hemoglobin genes are inherited. Persons with a thalassemia mutation in one gene are known as carriers or are said to have thalassemia minor. The severe form of thalassemia, thalassemia major, occurs when a child inherits two mutated genes, one from each parent. Children born with thalassemia major usually develop the symptoms of severe anemia within the first year of life. Lacking the ability to produce normal adult hemoglobin, children with thalassemia major are chronically fatigued; they fail to thrive; sexual maturation is delayed and they do not grow normally. Prolonged anemia causes bone deformities and eventually will lead to death, usually by their fifth birthday.

62 The only treatment to combat thalassemia major is regular transfusions of red blood cells. Persons with thalassemia major receive 15 cubic centimeters of washed red blood cells per kilogram of weight every 21 to 42 days for their lifetime. That is, a thalassemia major person weighing 60 kilograms (132 pounds) may receive 900 cubic centimeters of washed red blood cells each and every transfusion. Such a transfusion corresponds to four units of blood. Persons with thalassemia major have not been treated with pooled blood. Therefore, in each transfusion a thalassemia major person would receive blood from four different donors and over the course of a year would receive 70 units of blood from potentially 70 different donors. Over the course of the Class Period, a class member with thalassemia major might have received 315 units of blood from potentially 315 different donors.

63 Over the past three decades, advances in scientific research have allowed persons with thalassemia major in Canada to live relatively normal lives. Life expectancy has been extended beyond the fourth decade of life, often with minimal physical symptoms. In Canada approximately 300 persons live with thalassemia major.

64 Of the 147 transfused dependent thalassemia major patients currently being treated in the Haemoglobinopathy Program at the Hospital for Sick Children and Toronto General Hospital, 48 have tested positive using HCV antibody tests. Fifty-one percent of the population at TGH have tested positive; only 14% of the population of HSC have tested positive. The youngest of these persons was born in 1988; 9 of them are 13 years of age or older but less than 18 years of age; the balance are adults. Nine thalassemia major patients in the Haemoglobinopathy Program have died since HCV

testing was available in 1991. Seven of these persons were HCV positive. The Foundation estimates that there are approximately 100 thalassemia major patients across Canada who are HCV positive.

65 The unfairness pointed to by the Thalassemia Foundation is that class members suffering from thalassemia are included in the Transfused Class, and therefore must follow the procedures for that class in establishing entitlement. It is contended that this is fundamentally unfair to thalassemia victims because of the number of potential donors from whom each would have received blood or blood products. It is said that by analogy to the hemophiliac class, and the lesser burden of proof placed on members of that class, a similar accommodation is justified. I agree.

66 This is a situation where it is appropriate to create a sub-class of thalassemia victims from the Transfused Class. Sub-classes are provided for in s. 5(2) of the *CPA* and the power to amend the certification order is contained in s. 8(3) of the *Act*. The settlement should be amended to apply the entitlement provisions in the Hemophiliac Plan *mutatis mutandis* to the Thalassemia sub-class.

Law and Analysis

67 Section 29(2) of the *CPA* provides that:

> A settlement of a class proceeding is not binding unless approved by the court.

68 While the approval of the court is required to effect a settlement, there is no explicit provision in the *CPA* dealing with criteria to be applied by the court on a motion for approval. The test to be applied was, however, stated by Sharpe J. in *Dabbs v. Sun Life Assurance Co. of Canada* (February 24, 1998), Doc. Toronto 96-CT-022862 (Ont. Gen. Div.) (*Dabbs No. 1*) at para. 9:

> ...the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.

69 In the context of a class proceeding, this requires the court to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular member. As this court stated in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (June 17, 1999), Doc. 22487/96 (Ont. S.C.J.) at para. 89:

> The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

70 Sharpe J. stated in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429 (Ont. Gen. Div.), aff'd (1998), 41 O.R. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. dismissed October 22, 1998 [reported (1998), 235 N.R. 390 (note) (S.C.C.)], (*Dabbs No. 2*) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However, the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

71 Generally, in determining whether a settlement is "fair, reasonable and in the best interests of the class as a whole," courts in Ontario and British Columbia have reviewed proposed class proceeding settlements on the basis of the following factors:

1. Likelihood of recovery, or likelihood of success;

2. Amount and nature of discovery evidence;

3. Settlement terms and conditions;

4. Recommendation and experience of counsel;

5. Future expense and likely duration of litigation;

6. Recommendation of neutral parties if any;

7. Number of objectors and nature of objections; and

8. The presence of good faith and the absence of collusion.

See *Dabbs No. 1* at para. 13, *Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.* (1998), 169 D.L.R. (4th) 565 (B.C. S.C.) at 571. See also Conte, *Newberg on Class Actions*, (3rd ed) (West Publishing) at para. 11.43.

72 In addition to the foregoing, it seems to me that there are two other factors which might be considered in the settlement approval process: i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and ii) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation. These two additional factors go hand-in-glove and provide the court with insight into whether the bargaining was interest-based, that is reflective of the needs of the class members, and whether the parties were bargaining at equal or comparable strength. A reviewing court, in exercising its supervisory jurisdiction is, in this way, assisted in appreciating fully whether the concerns of the class have been adequately addressed by the settlement.

73 However, the settlement approval exercise is not merely a mechanical *seriatim* application of each of the factors listed above. These factors are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater significance than others and should accordingly be attributed greater weight in the overall approval process.

74 Morover, the court must take care to subject the settlement of a class proceeding to the proper level of scrutiny. As Sharpe J. stated in *Dabbs No. 2* at 439-440:

> A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario," a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion." On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection.

75 The preceding admonition is especially apt in the present circumstances. Class counsel described the agreement before the court as "the largest settlement in a personal injury action in Canadian history." The settlement is Pan-Canadian in scope, affects thousands of people, some of whom are thus far unaware that they are claimants, and is intended to be administered for over 80 years. It cannot be seriously contended that the tragedy at the core of these actions

does not have a present and lasting impact on the class members and their families. While the resolution of the litigation is a noteworthy aim, an improvident settlement would have repercussions well into the future.

76 Consequently, this is a case where the proposed settlement must receive the highest degree of court scrutiny. As stated in the *Manual for Complex Litigation*, 3rd Ed. (Federal Judicial Centre: West Publishing, 1995) at 238:

> Although settlement is favoured, court review must not be perfunctory; the dynamics of class action settlement may lead the negotiating parties — even those with the best intentions — to give insufficient weight to the interests of at least some class members. *The court's responsibility is particularly weighty when reviewing a settlement involving a non-opt-out class or future claimants.* (Emphasis added.)

77 The court has been assisted in scrutinizing the proposed settlement by the submissions of several intervenors and objectors. I note that some of the submissions, as acknowledged by counsel for the objectors, raised social and political concerns about the settlement. Without in any way detracting from the importance of these objections, it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

78 However, although there may have been social or political undertones to many of the objections, legal issues raised by those objections, either directly or peripherally, are properly considered by the court in reviewing the settlement. Counsel for the objectors described the legal issues raised, in broad terms, as objections to:

(a) the adequacy of the total value of the settlement amount;

(b) the extent of compensation provided through the settlement;

(c) the sufficiency of the settlement Fund to provide the proposed compensation;

(d) the reversion of any surplus;

(e) the costs of administering the Plans; and

(f) the claims process applicable to Thalassemia victims.

I have dealt with the objection regarding the Thalassemia victims above. The balance of these objections will be addressed in the reasons which follow.

79 It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscient wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The *CPA* mandates that class members retain, for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgement that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice ot opt out while in full knowledge of the compensation otherwise available by remaining a member of the class.

80 This settlement must be reviewed on an objective standard, taking into account the need to provide compensation for all of the class members while at the same time recognizing the inherent difficulty in crafting a universally satisfactory settlement for a disparate group. In other words, the question is does the settlement provide a reasonable alternative for those Class Members who do not wish to proceed to trial?

81 Counsel for the class and the Crown defendants urged this court to consider the question on the basis of each class member's likely recovery in individual personal injury tort litigation. They contend that the benefits provided at each level are similar to the awards class members who are suffering physical manifestations of HCV infection approximating those set out in the different levels of the structure of this settlement would receive in individual litigation. In my view, this approach is flawed in the present case.

82 An award of damages in personal injury tort litigation is idiosyncratic and dependent on the individual plaintiff before the court. Here, although the settlement is structured to account for Class Members with differing medical conditions by establishing benefits on an ascending classification scheme, no allowances are made for the spectrum of damages which individual class members within each level of the structure may suffer. The settlement provides for compensation on a "one-size fits all" basis to all Class Members who are grouped at each level. However, it is apparent from the evidence before the court on this motion that the damages suffered as a result of HCV infection are not uniform, regardless of the degree of progression.

83 The evidence of Dr. Frank Anderson, a leading practitioner working with HCV patients in Vancouver, describes in detail the uncertain prognosis that accompanies HCV and the often debilitating, but unevenly distributed, symptomology that can occur in connection with infection.

He states:

> Once infected with HCV, a person will either clear HCV after an acute stage of develop chronic HCV infection. At present, the medical literature establishes that approximately 20-25% of all persons infected clear HCV within approximately one year of infection. Those persons will still test positive for the antibody and will probably do so for the rest of their lives, but will not test positive on a PCR test, nor will they experience any progressive liver disease due to HCV.
>
> Persons who do not clear the virus after the acute stage of the illness have chronic HCV. They may or may not develop progressive liver disease due to HCV, depending on the on the course HCV takes in their body and whether treatment subsequently achieves a sustained remission. A sustained remission means that the virus is not detectable in the blood 6 months after treatment, the liver enzymes are normal, and that on a liver biopsy, if one were done, there would be no inflammation. Fibrosis in the liver is scar tissue caused by chronic inflammation, and as such is not reversible, and will remain even after therapy. It is also possible to spontaneously clear the virus after the acute phase of the illness but when this happens and why is not well understood. The number of patients spontaneously clearing the virus is small.
>
> HCV causes inflammation of the liver cells. The level of inflammation varies among HCV patients. ... the inflammation may vary in intensity from time to time.
>
> . . . . .
>
> Inflammation and necrosis of liver cells results in scarring of liver tissue (fibrosis). Fibrosis also appears in various patterns in HCV patients... Fibrosis can stay the same or increase over time, but does not decrease, because although

the liver can regenerate cells, it cannot reverse scarring. On average it takes approximately 20 years from point of infection with Hepatitis C until cirrhosis develops, and so on a scale of 1 to 4 units the best estimate is that the rate of fibrosis progression is 0.133 units per year.

. . . . .

Once a patient is cirrhotic, they are either a compensated cirrhotic, or a decompensated cirrhotic, depending on their liver function. In other words, the liver function may still be normal even though there is fibrosis since there may be enough viable liver cells remaining to maintain function. These persons would have compensated cirrhosis. If liver function fails the person would then have decompensated cirrhosis. The liver has very many functions and liver failure may involve some or many of these functions. Thus decompensation may present in a number of ways with a number of different signs and symptoms.

A compensated cirrhotic person has generally more than one third of the liver which is still free from fibrosis and whose liver can still function on a daily basis. They may have some of the symptoms discussed below, but they may also be asymptomatic.

Decompensated cirrhosis occurs when approximately 2/3 of the liver is compromised (functioning liver cells destroyed) and the liver is no longer able to perform one or more of its essential functions. It is diagnosed by the presence of one or more conditions which alone or in combination is life threatening without a transplant. This clinical stage of affairs is also referred to as liver failure or end stage liver disease. The manifestations of decompensation are discussed below. Once a person develops decompensation, life expectancy is short and they will generally die within approximately 2-3 years unless he or she receives a liver transplant.

Patients who progress to cirrhosis but not to decompensated cirrhosis may develop hepatocellular cancer ("HCC"). This is a cancer, which originates from liver cells, but the exact mechanism is uncertain. The simple occurrence of cirrhosis may predispose to HCC, but the virus itself may also stimulate the occurrence of liver cell cancer. Life expectancy after this stage is approximately 1-2 years.

. . . . .

The symptoms of chronic HCV infection, prior to the disease progressing to cirrhosis or HCC include: fatigue, weight loss, upper right abdominal pain, mood disturbance, and tension and anxiety....

Of those symptoms, fatigue is the most common, the most subjective and the most difficult to assess... There is also general consensus that the level of fatigue experienced by an individual infected with HCV does not correlate with liver enzyme levels, the viral level in the blood, or the degree of inflammation or fibrosis on biopsy. It is common for the degree of fatigue to fluctuate from time to time.

Dr. Anderson identifies some of the symptoms associated with cirrhosis which can include skin lesions, swelling of the legs, testicular atrophy in men, enlarged spleen and internal hemorrhaging. Decompensated cirrhosis symptomatic effects, he states, can include jaundice, hepatic encephalopathy, protein malnutrition, subacute bacterial peritonitis and circulatory and pulmonary changes. Dr. Anderson also states, in respect of his own patients, that "at least 50% of my HCV infected patients who have not progressed to decompensated cirrhosis or HCC are clinically asymptomatic."

84 It is apparent, in light of Dr. Anderson's evidence, that in the absence of evidence of the individual damages sustained by class members, past precedents of damage awards in personal injury actions cannot be applied to this case to

assess the reasonableness of the settlement for the class.

85 This fact alone is not a fatal flaw. There have long been calls for reform of the "once and for all" lump sum awards that are usually provided in personal injury actions. As stated by Dickson J. in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 (S.C.C.), at 236:

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

86 The "once-and-for-all" lump sum award is the common form of compensation for damages in tort litigation. Although the award may be used to purchase annuities to provide a "structured" settlement, the successful claimant receives one sum money that is determined to be proper compensation for all past and future losses. Of necessity, there is a great deal of speculation involved in determining the future losses. There is also the danger that the claimant's future losses will prove to be much greater than are contemplated by the award of damages received because of unforeseen problems or an inaccurate calculation of the probability of future contingent events. Thus even though the claimant is successful at trial, in effect he or she bears the risk that there may be long term losses in excess of those anticipated. This risk is especially pronounced when dealing with a disease or medical condition with an uncertain prognosis or where the scientific knowledge is incomplete.

87 The present settlement is imaginative in its provision for periodic subsequent claims should the class member's condition worsen. The underlying philosophy upon which the settlement structure is based is set forth in the factum of the plaintiffs in the Transfused Action. They state at para. 10 that:

> The Agreement departs from the common law requirement of a single, once-and-for-all lump sum assessment and instead establishes a system of periodic payments to Class Members and Family Class Members depending on the evolving severity of their medical condition and their needs.

88 This forward-looking provision addresses the concern expressed by Dickson J. with respect to the uncertainty and unfairness of a once and for all settlement. Indeed, the objectors and intervenors acknowledge this in that they do not take issue with the benefit distribution structure of the settlement as much as they challenge the benefits provided at the levels within the structure.

89 These objections mirror the submissions in support of the settlement, in that they are largely based on an analogy to a tort model compensation scheme. For the reasons already stated, this analogy is not appropriate because the proper application of the tort model of damages compensation would require an examination of each individual case. In the absence of an individualized examination, the reasonableness, or adequacy, of the settlement cannot be determined by a comparison to damages that would be obtained under the tort model. Rather the only basis on which the court can proceed in a review of this settlement is to consider whether the total amount of compensation available represents a reason-

able settlement, and further, whether those monies are distributed fairly and reasonably among the class members.

90 The total value of the Pan-Canadian settlement is estimated to be $1.564 billion dollars. This is calculated as payment or obligation to pay by the federal, provincial and territorial governments in the an amount of $1.207 billion on September 30, 1999, plus the tax relief of $357 million over the expected administrative term of the settlement. This amount is intended to settle the class proceedings in Ontario, British Columbia and Quebec. The Ontario proceeding, as stated above, covers all of those class members in Canada other than those included in the actions in British Columbia and Quebec.

91 Counsel for the plaintiffs and for the settling defendants made submissions to the court with respect the length and intensity of the negotiations leading up to the settlement. There was no challenge by any party as to the availability of any additional compensation. I am satisfied on the evidence that the negotiations achieved the maximum total funding that could be obtained short of trial.

92 In applying the relevant factors set out above to the global settlement figure proposed, I am of the view that the most significant consideration is the substantial litigation risk of continuing to trial with these actions. The CRCS is the primary defendant. It is now involved in protracted insolvency proceedings. Even if the court-ordered stay of litigation proceedings against it were to be lifted, it is unlikely that there would be any meaningful assets available to satisfy a judgment. Secondly, there is a real question as to the liability of the Crown defendants. Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable at trial. Counsel for the federal government places the odds on the Crown successfully defending the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates. In addition to the high risk of failure at trial, given the plethora of complex legal issues involved in the proceedings, there can be no question that the litigation would be lengthy, protracted and expensive, with a final result, after all appeals are exhausted, unlikely until years into the future.

93 Moving to the remaining factors, although there have been no examinations for discovery, the extensive proceedings before the Krever Commission serve a similar purpose. The settlement is supported by the recommendation of experienced counsel as well as many of the intervenors. There is no suggestion of bad faith or collusion tainting the settlement. The support of the intervenors, particularly the Canadian Hemophilia Society which made submissions regarding the meetings held with class members, is indicative of communication between class counsel and the class members. Although, there were some objectors who raised concerns about the degree of communication with the Transfused Class members, these complaints were not strenuously pursued. Perhaps the most compelling evidence of the adequacy of the communications with the class members regarding the settlement is the relatively low number of objections presented to the court considering the size of the classes. Finally, counsel for all parties made submissions, which I accept, regarding the rigourous negotiations that resulted in the final settlement.

94 In conclusion, I find that the global settlement represents a reasonable settlement when the significant and very real risks of litigation are taken into account.

95 The next step in the analysis is to determine whether the monies available are allocated in such a way as to provide for a fair and reasonable distribution among the class members. In my view, as the settlement agreement is presently constituted, they are not. My concern lies with the provision dealing with opt out claimants. Under the agreement, if opt out claimants are successful in individual litigation, any award such a claimant receives will be satisfied out of the settlement Fund. While this has the potential of depleting the Fund to the detriment of the class members, thus rendering the settlement uncertain, the far greater concern is the risk of inequity, that this creates in the settlement uncertain,

the far greater concern is the risk of inequity, that this creates in the settlement distribution. The *Manual for Complex Litigation* states at 239 that whether "claimants who are not members of the class are treated significantly differently" than members of the class is a factor that may "be taken into account in the determination of the settlement's fairness, adequacy and reasonableness..."

96 In principle, there is nothing egregious about the payment of settlement funds to non-class members. Section 26(6) of the *CPA* provides the court with the discretion to sanction or direct payments to non-class members. In effect, the opt out provision reflects the intention of the defendants to settle all present and future litigation. This objective is not contrary to the scheme of the CPA per se. See, for example, the reasons of Brenner J. in *Sawatzky v. Société Chirurgicale Instrumentarium Inc.* (August 4, 1999), Doc. Vancouver C954740 (B.C. S.C.), adopted by this court in *Bisignano v. La Corporation Instrumentarium Inc.* (September 1, 1999), Doc. 22404/96 (Ont. S.C.J.)

97 However, given that the settlement must be "fair, reasonable and in the best interests of the class," the court cannot sanction a provision which gives opt out claimants the potential for preferential treatment in respect of access to the Fund. The opt out provision as presently written has this potential effect where an opt out claimant either receives an award or settlement in excess of the benefits that he or she would have received had they not opted out and which must be satisfied out of the Fund. Alternatively, the preferential treatment could also occur where the opt out claimant receives an award similar to their entitlement under the settlement in quantum but without regard for the time phased payment structure of the settlement.

98 In my view, where a defendant wishes to settle a class proceeding by providing a single Fund to deal with both the claims of the class members and the claims of individuals opting out of the settlement, the payments out of the Fund must be made on an equitable basis amongst all of the claimants. Fairness does not require that each claimant receive equal amounts but what cannot be countenanced is a situation where an opt out claimant who is similarly situated to a class member receives a preferential payment.

99 The federal government argues that fairness ensues, even in the face of the different treatment, because the opt out claimant assumes the risk of individual litigation. I disagree. Because the defendants intend that all claims shall be satisfied from a single fund, individual litigation by a claimant opting out of the class pits that claimant against the members of the class. The opt out claimant stands to benefit from success because he or she may achieve an award in excess of the benefits provided under the settlement. This works to the detriment of the class members by the reducing the total amount of the settlement. More importantly however, the benefits to the class members will not increase as a result of unsuccessful opt out claimants.

100 In the instant case, fairness requires a modification to the opt out claimant provision of the settlement. The present opt out provision must be deleted and replaced with a provision that in the event of successful litigation by an opt out claimant, the defendants are entitled to indemnification from the Fund only to the extent that the claimant would have been entitled to claim from the Fund had he or she remained in the class. This must of necessity include the time phasing factor. Such a provision ensures fairness in that there is no prospect of preferential distribution from the Fund, nor will the class suffer any detrimental effect as a result of the outcome of the individual litigation. The change also provides a complete answer to the complaint that the current opt out provision renders the settlement uncertain. Similarly, the modification renders the provision for defence costs to be paid out of the Fund unnecessary and thus it must be deleted.

101 Accordingly, the opt out provision of the settlement would not be an impediment to court approval with the modifications set out above.

102 In my view, the remainder of distribution scheme is fair and reasonable with this alteration to the opt out provi-

sion. It is beyond dispute that the compensation at any level will not be perfect, nor will it be tailored to individual cases but perfection is not the standard to be applied. The benefit levels are fair. More pointedly, fairness permeates the settlement structure in that each and every class member is provided an opportunity to make subsequent claims if his or her condition deteriorates. An added advantage is that there is a pre-determined, objective qualifying scheme so that class members will be able to readily assess their eligibility for additional benefits. Thus, while a claimant may not be perfectly compensated at any particular level, the edge to be gained by a scheme which terminates the litigation while avoiding the pitfalls of an imperfect, one-time-only lump sum settlement is compelling.

103 In any event, the settlement structure also provides a reasonable basis for the distribution of the funds available. Class counsel described the distribution method as a "need not greed" system, where compensation is meant, within limits, to parallel the extent of the damages. There were few concerns raised about the compensation provided at the upper levels of the scheme. Rather, the majority of the objections centred on the benefits provided at Levels 1, 2 and 3. The damages suffered by those whose conditions fall within these Levels are clearly the most difficult to assess. This is particularly true in respect of those considered to be at Level 2. However, in order to provide for the subsequent claims, compromises must be made and in this case, I am of the view that the one chosen is reasonable.

104 Regardless of the submissions made with respect to comparable awards under the tort model, it is clear from the record that the compensatory benefits assigned to claimants at different levels were largely influenced by the total of the monies available for allocation. As stated in the CASL study at p. 3:

> At the request of the Federal government of Canada, provincial governments, and Hepatitis C claimants, i.e. individuals infected with hepatitis C virus during the period of 1986 to 1990, an impartial group, the Canadian Association for the Study of the Liver (CASL) was asked to construct a natural history model of Hepatitis C. *The intent of this effort was to generate a model that would be used by all parties, as guide to disbursing funds set aside to compensate patients infected with hepatitis C virus through blood transfusion.*

105 Of necessity, the settlement cannot, within each broad category, deal with individual differences between victims. Rather it must be general in nature. In my view, the allocation of the monies available under the settlement is "fair, reasonable and in the best interests of the class as a whole."

106 In making this determination, I have not ignored the submissions made by certain objectors and intervenors regarding the sufficiency of the Fund. They asserted that the apparent main advantage of this settlement, the ability to "claim time and time again" is largely illusory because the Fund may well be depleted by the time that the youngest members of the class make claims against it.

107 I cannot accede to this submission. The Eckler report states that with the contemplated holdbacks of the lump sum at Level 2 and the income replacement at Level 4 and above, the Fund will have a surplus of $34,173,000. Admittedly, Eckler currently projects a deficit of $58,533,000 if the holdbacks are released.

108 However, the Eckler report contains numerous caveats regarding the various assumptions that have been made as a matter of necessity, including the following, which is stated in section 12.2:

> A considerable number of assumptions have been made in order to calculate the liabilities in this report. Where we have made the assumptions, we used our best efforts based on our understanding of the plan benefits; in general, where we have made simplifying assumptions or approximations, we have tried to err on the conservative side, i.e. increasing costs and liabilities. In many instances we have relied on counsel for the assumptions and understand that they have used their best efforts in making these. Nevertheless, the medical outcomes are very unclear — e.g. the

> CASL report indicates very wide ranges in its confidence intervals for the various probabilities it developed. There is substantial room for variation in the results. The differences will emerge in the ensuing years as more experience is obtained on the actual cohort size and characteristics of the infected claimants. These differences and the related actuarial assumptions will be re-examined at each periodic assessment of the Fund.

109 Unfortunately, but not unexpectedly, the limitations of the underlying medical studies upon which Eckler has based its report require the use of assumptions. For example, the report prepared by Dr. Remis, dated July 6, 1999, states at p. 642:

> There are important limitations to the analyses presented here and, in particular, with the precision of the estimates of the number of HCV-infected recipients who are likely to qualify for benefits under the Class Action Settlement...
>
> The proportion of transfusion recipients who will ultimately be diagnosed is particularly important in this regard and has substantial impact on the final estimate. We used an estimate of 70% as the best case estimate for this proportion based on the BC experience but the actual proportion could be substantially different from this, depending on the type, extent and success of targeted notification activities that will be undertaken, especially in Ontario and Quebec. This could alter the ultimate number who eventually qualify for benefits by as much as 1,500 in either direction.

110 The report of the CASL study states at p. 22:

> Our attempt to project the natural history of the 1986-1990 post transfusion HCV infected cohort has limitations. Perhaps foremost among these is our lack of understanding of the long-term prognosis of the disease. For periods beyond 25 years, projections remain particularly uncertain. The wide confidence intervals surrounding long-term projections highlight this uncertainty.
>
> Other key limitations are lack of applicability of these projections to children and special groups.

111 The size of the cohort and the percentage of the cohort which will make claims against the Fund are critical assumptions. Significant errors in either assumption will have a dramatic impact on the sufficiency of the Fund. Recognizing this, Eckler has chosen to use the most conservative estimates from the information available. The cohort size has been estimated from the CASL study rather than other studies which estimate approximately 20% less surviving members. Furthermore, Eckler has calculated liabilities on the basis that 100% of the estimated cohort will make claims against the Fund.

112 Class counsel urged the court to consider the empirical evidence of the "take-up rate" demonstrated in the completed class proceeding, *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (Ont. Gen. Div.), leave to appeal dismissed (1995), 129 D.L.R. (4th) 110 (Ont. Gen. Div.), to support a conclusion that the Fund is sufficient. In *Nantais* , all of the class members were known and accordingly received actual notice of the settlement. Seventy-two per cent of the class chose to make claims, or "take-up" the settlement. It was contended that this amounted to strong evidence that less than one hundred per cent of the classes in these proceedings would take up this settlement. I cannot accept the analogy. While I agree that it is unlikely that the entire estimated cohort will take up the settlement, it is apparent from the caveats expressed in the reports provided to the court that the estimate of the cohort size may be understated by a significant number. Accordingly, for practical purposes, a less than one hundred per cent take up rate could well be counter-balanced by a concurrent miscalculation of the cohort size.

113 Although I cannot accept the *Nantais* experience as applicable on this particular point, the Eckler report stands alone as the only and best evidence before the court from which to determine the sufficiency of the Fund. Eckler has re-

cognized the deficiencies inherent in the information available by using the most conservative estimates throughout. This provides the court with a measure of added comfort. Not to be overlooked as well, the distribution of the Fund will be monitored by this court and the courts in Quebec and British Columbia, guided by periodically revised actuarial projections. In my view, the risk that the Fund will be completely depleted for latter claimants is minimal.

114 Consequently, given the empirical evidence proffered by Dr. Anderson as to the asymptomatic potential of HCV infection, the conservative approach taken by Eckler in determining the likely claims against the Fund and the role of the courts in monitoring the ongoing distributions, I am of the view that the projected shortfall of $58,000,000 considered in the context of the size of the overall settlement, is within acceptable limits. I find on the evidence before me, that the Fund is sufficient to provide the benefits and, thus in this respect, the settlement is reasonable.

115 I turn now to the area of concern raised by counsel for the intervenor the Hepatitis C Society of Canada (the "Society"), namely the provision that mandates reversion of the surplus of the Plans to the defendants. The Society contends that this provision *simpliciter* is repugnant to the basis on which this settlement is constructed. It argues that the benefit levels were established on the basis of the total monies available, rather than a negotiation of benefit levels *per se*. Thus, it states there is a risk that the Fund will not be sufficient to provide the stated benefits and further, that this risk lies entirely with the class members because the defendants have no obligation to supplement the Fund if it proves to be deficient for the intended purpose. Moreover, the Society argues that the use of conservative estimates in defining the benefit levels, although an attempt at ensuring sufficiency, has the ancillary negative effect of minimizing the benefits payable to each class member under the settlement. Therefore, the Society contends that a surplus, if any develops in the ongoing administration of the Fund, should be used to augment the benefits for the class members.

116 The issue here is whether a reversion clause is appropriate in a settlement agreement in this class proceeding, and by extension, whether the inclusion of this clause is such that it would render the overall settlement unacceptable.

117 It is important to frame the submission of the Society in the proper context. This is not a case where the question of entitlement to an existing surplus is presented. Indeed, given the deficit projected by the Eckler report, it is conjectural at this stage whether the Fund will ever generate a surplus. If the Fund accumulates assets over and above the current Eckler projections, they must first be directed toward eliminating the deficit so that the holdbacks may be released.

118 The plan also provides that after the release of the holdbacks, the administrator may make an application to raise the $75,000 annual cap on income replacement if the Fund has sufficient assets to do so. It is only after these two areas of concern have been fully addressed that a surplus could be deemed to exist.

119 The clause in issue does not, according to the interpretation given to the court by class counsel, permit the withdrawal by the defendants of any actuarial surplus that may be identified in the ongoing administration of the Fund. Rather, they state that it is intended that the remainder of the Fund, if any, revert to the defendants only after the Plans have been fully administered in the year 2080.

120 Remainder provisions in trusts are not unusual. Further, I reiterate that it is, at this juncture, complete speculation as to whether a surplus, either ongoing or in a remainder amount, will exist in the Fund. However, accepting the submission of class counsel at face value, the reversion provision is anomalous in that it is neither in the best interests of the plaintiff classes nor in the interests of defendants. The period of administration of the Fund is 80 years. No party took issue with class counsel's submission that the defendants are not entitled under the current language to withdraw any surplus in the Fund until this period expires. Likewise, there is no basis within the settlement agreement upon which the class members could assert any entitlement to access any surplus during the term of the agreement. Thus, any surplus would remain tied up, benefiting neither party during the entire 80 year term of the settlement.

121 Quite apart from the question of tying up the surplus for this unreasonable period of time, there is the underlying question of whether in the context of this settlement, it is appropriate for the surplus to revert in its entirety to the defendants.

122 The court is asked to approve the settlement even though the benefits are subject to fluctuation and regardless that the defendants are not required to make up any shortfall should the Fund prove deficient. This is so notwithstanding that the benefit levels are not perfect. It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of a surplus may be applied to benefit class members.

123 This is not to say that it is necessary, as the Society suggests, that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the settlement agreement. There are a range of possible uses to which any surplus may be put so as to benefit the class as a whole without focusing on any particular class member or group of class members. This is in keeping with the *CPA* which provides in s. 26(4) that surplus funds may "be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members..." On the other hand, in the proper circumstances, it may not be beyond the realm of reasonableness to allow the defendants access to a surplus within the Fund prior to the expiration of the 80 year period.

124 To attempt to determine the range of reasonable solutions at present, when the prospect of a surplus is uncertain at best, would be to pile speculation upon speculation. In the circumstances therefore, the only appropriate course, in my opinion, is to leave the question of the proper application of any surplus to the administrator of the Fund. The administrator may recommend to the court from time to time, based on facts, experience with the Fund and future considerations, that all or a portion of the surplus be applied for the benefit of the class members or that all or a portion be released to the defendants. In the alternative, the surplus may be retained within the Fund if the administrator determines that this is appropriate. Any option recommended by the administrator would, of course, be subject to requisite court approval. This approach is in the best interests of the class and creates no conflicts between class members. Moreover, it resolves the anomaly created by freezing any surplus for the duration of the administration of the settlement. If the present surplus reversion clause is altered to conform with the foregoing reasons, it would meet with the court's approval.

125 There was an expressed concern as to the potential for depletion of the Fund through excessive administrative costs. The court shares this concern. However, the need for efficient access to the plan benefits for the class members and the associated costs that this entails must also be recognized. This requires an ongoing balancing so as to keep administrative costs in line while at the same time providing a user friendly claims administration. The courts, in their supervisory role, will be vigilant in ensuring that the best interests of the class will be the predominant criterion.

Disposition

126 In ordinary circumstances, the court must either approve or reject a settlement in its entirety. As stated by Sharpe J. in *Dabbs No. 1* at para. 10:

> It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms; *Poulin v. Nadon*, [1950] O.R. 219 (C.A.) at 222-3.

127 These proceedings, emanating from the blood tragedy, are novel and unusually complex. The parties have adverted to this in the settlement agreement which contemplates the necessity for changes of a non-material nature in Clause 12.01:

> This Agreement will not be effective unless and until it is approved by the Court in each of the Class Actions, and *if such approvals are not granted without any material differences therein*, this Agreement will be thereupon terminated and none of the Parties will be liable to any other Parties hereunder. (Emphasis added.)

128 The global settlement submitted to the court for approval is within the range of reasonableness having regard for the risk inherent in carrying this matter through to trial. Moreover, the levels of benefits ascribed within the settlement are acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighs any deficiencies which might exist in the levels of benefits.

129 I am satisfied based on the Eckler report that the Fund is sufficient, within acceptable tolerances to provide the benefits stipulated. There are three areas which require modification, however, in order for the settlement to receive court approval. First, regarding access to the Fund by opt out claimants, the benefits provided from the Fund for an opt out claimant cannot exceed those available to a similarly injured class member who remains in the class. This modification is necessary for fairness and the certainty of the settlement. Secondly, the surplus provision must be altered so as to accord with these reasons. Thirdly, in the interests of fairness, a sub-class must be created for the thalassemia victims to take into account their special circumstances.

130 The defendants have expressed their intention to be bound by the settlement if it receives court approval absent any material change. As stated, this reflects their acknowledgment of the complexity of the case, the scientific uncertainty surrounding the infections and the fact this settlement is crafted with a degree of improvisation.

131 The changes to the settlement required to obtain the approval of this court are not material in nature when viewed from the perspective of the defendants. Accepting the assumed value of $10,000,000 attributed to the opt outs by class counsel, a figure strongly supported by counsel for the defendants, the variation indicated is *de minimis* in the context of a $1.564 billion dollar settlement. The change required in respect of the surplus provision resolves the anomaly of tying up any surplus for the entire 80 year period of the administration of the settlement. In any event, given the projected $58,000,000 deficit, the question of a surplus is highly conjectural. The creation of the sub-class of thalassemia victims, in the context of the cohort size is equally *de minimis*. I am prepared to approve the settlement with these changes.

132 However, should the parties to the agreement not share the view that these changes are not material in nature, they may consider the proposed changes as an indication of "areas of concern" within the meaning the words of Sharpe J. in *Dabbs No. 1* at para. 10:

> As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement...

133 The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However, perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

I am obliged to counsel, the parties and the intervenors and especially to the individual objectors who took the time to

either file a written objection or appear in person at the hearings.

Motion granted.

END OF DOCUMENT

TAB 15

1998 CarswellOnt 5823, [1998] O.J. No. 1598

1998 CarswellOnt 5823, [1998] O.J. No. 1598

Dabbs v. Sun Life Assurance Co. of Canada

Paul Dabbs, Plaintiff and Sun Life Assurance Company of Canada, Defendant

Ontario Court of Justice (General Division)

Sharpe J.

Judgment: February 24, 1998
Heard: February 5, 1998
Docket: Toronto 96-CT-022862

Counsel: *Michael A. Eizenga* and *Charles M. Wright*, for Plaintiff.

H. Lorne Morphy and *Patricia D.S. Jackson*, for Defendant.

Michael Deverett, for 3 Objectors.

Gary R. Will and *J. Douglas Barnett*, for 11 Objectors.

Subject: Civil Practice and Procedure

Practice --- Disposition without trial — Settlement — Enforcement of terms

Plaintiff brought action for breach of contract and negligent misrepresentation against insurer — Action was settled subject to court approval — Motion was brought for certification as class action and court approval of settlement — Fourteen members of proposed class filed objections — Hearing was directed to determine procedural issues — Parties proposing settlement bore onus of satisfying court that approval should be granted — Role of court was to determine whether settlement was fair, reasonable and in best interest of class as whole — Parties proposing settlement were required to present sufficient evidence to permit exercise of objective, impartial, and independent assessment of fairness of settlement — Objectors could adduce evidence relevant to objection, but did not have right to oral or documentary discovery — Objectors could cross-examine on affidavits filed in support of settlement, subject to conditions — Case did not justify interim costs to ensure objectors could continue participation.

Practice --- Parties — Representative or class actions — Procedural requirements

Plaintiff brought action for breach of contract and negligent misrepresentation against insurer — Action was

settled subject to court approval — Motion was brought for certification as class action and court approval of settlement — Fourteen members of proposed class filed objections — Hearing was directed to determine procedural issues — Parties proposing settlement bore onus of satisfying court that approval should be granted — Role of court was to determine whether settlement was fair, reasonable and in best interest of class as whole — Parties proposing settlement were required to present sufficient evidence to permit exercise of objective, impartial, and independent assessment of fairness of settlement — Objectors could adduce evidence relevant to objection, but did not have right to oral or documentary discovery — Objectors could cross-examine on affidavits filed in support of settlement, subject to conditions — Case did not justify interim costs to ensure objectors could continue participation.

Cases considered by *Sharpe J.*:

Bowling v. Pfizer (1992), 143 F.R.D. 141 (U.S. Ohio) — referred to

Kevork v. R., [1984] 2 F.C. 753, 17 C.C.C. (3d) 426 (Fed. T.D.) — referred to

Mahar v. Rogers Cablesystems Ltd. (1995), 34 Admin. L.R. (2d) 51, 25 O.R. (3d) 690 (Ont. Gen. Div.) — referred to

Newman v. Stein (1972), 464 F.2d 689, Fed. Sec. L. Rep. P 93, 547 (U.S. 2nd Cir. N.Y.) — considered

Organ v. Barnett (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.) — applied

Poulin v. Nadon, [1950] O.R. 219, [1950] O.W.N. 163, [1950] 2 D.L.R. 303 (Ont. C.A.) — referred to

Sparling v. Southam Inc. (1988), 41 B.L.R. 22, 66 O.R. (2d) 225 (Ont. H.C.) — applied

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 242(2) — referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6

Generally — pursuant to

s. 12 — considered

s. 14 — considered

s. 14(2) — considered

s. 29 — considered

s. 32(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 7.08(1) — referred to

RULING on hearingto determine procedure for court approval of settlement and class action certification.

***Sharpe J.*:**

1. Nature of Proceedings

1 In this action, commenced pursuant to the *Class Proceedings Act 1992*, the plaintiff asserts claims for alleged breach of contract and negligent misrepresentation arising out of the manner in which whole life participating insurance policies with a premium offset option were sold. Similar actions were commenced in Quebec and in British Columbia. Before the defendant filed a statement of defence and before certification as a class proceeding, this action, together with the Quebec and British Columbia actions, was settled by written agreement, dated June 16, 1997, setting out detailed and complex terms. The settlement is subject to and conditional upon court approval in all three provinces.

2 Winkler J. approved a form of notice of motion for a certification/authorization and agreement approval to be sent to members of the proposed Ontario class. Similar orders were made in Quebec and British Columbia. The notice stated that members of the class who wished to participate in the hearing for approval of the settlement were required to file a written statement of objection and notice of appearance by a specified date. Fourteen members of the proposed Ontario class filed objections. Three are represented by Mr. Deverett and eleven by Messrs. Will and Barnett. At the opening of this hearing, Mr. Deverett indicated that one of the objectors he represents wished to withdraw from further participation.

3 On August 28, 1997 Winkler J. directed that there be a hearing to determine certain procedural issues, namely:

(a) Standing to object;

(b) Procedures for and scope of objection;

(c) The role of the court in approval of the agreement;

(d) Onus for approval of the agreement;

(e) Factors to be considered by the court for approval of the agreement;

(f) Cost consequences.

4 The issue of standing was determined by Winkler J. and it was contemplated that the motion to determine the remaining procedural issues would be heard on September 4, 1997. It did not proceed on that date as the Deverett objectors requested an adjournment. The Deverett objectors then brought a motion to set aside Winkler J.'s earlier order regarding the notice of motion for certification/authorization, to declare the plaintiff's counsel to be in a conflict of interest, and for other relief, including an order that those objectors be given immunity from costs and be awarded interim costs. While the costs issue remains outstanding, other aspects of the motion were dismissed by Winkler J. An application for leave to appeal from that order was dismissed by O'Driscoll J. on

January 22, 1998.

5 I have now heard full argument on the outstanding procedural issues specified by Winkler J.'s August 29, 1997 direction. For convenience of analysis, I propose to deal with them in the following order:

(a) Onus for approval of the agreement

(b) The role of the court in approval of the agreement

(c) Factors to be considered by the court for approval of the agreement

(d) Procedures for and scope of objection

(e) Cost consequences.

6 I wish to emphasize at the outset that what follows is intended only to provide a procedural framework for the hearing of this motion. It would be entirely inappropriate to attempt to determine in the context of one case a process appropriate for all cases. My ruling has been determined on the basis of the submissions I have heard and is intended to do no more than provide guidance to the parties and objectors in the present case.

2. Analysis

(a) Onus for approval of the agreement

7 It is common ground that the parties proposing the settlement bear the onus of satisfying the court that it ought to be approved.

(b) The role of the court in approval of the agreement

8 There are two matters to be determined by the court: (1) should the action be certified as a class proceeding and, if the answer is yes, (2) should the settlement be approved. While the role of the court with respect to certification is well defined by the *Class Proceedings Act, 1992*, the same cannot be said of the approval of settlements. Section 29 provides that "[a] settlement of a class proceeding is not binding unless approved by the court" but the *Act* provides no statutory guidelines that are to be followed.

9 Experience from other situations in which the court is required to approve settlements does, however, provide guidance. Court approval is required in situations where there are parties under disability (see Rule 7.08(1)). Court approval is also required in other circumstances where there are affected parties not before the court (see *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 242(2) dealing with derivative actions). The standard in these situations is essentially the same and is equally applicable here: *the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it.*

10 It has often been observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms: *Poulin v. Nadon*, [1950] O.R. 219 (Ont. C.A.), at 222-3. As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement: see eg *Bowling v. Pfizer*, 143 F.R.D. 141 (U.S. Ohio 1992). I would observe, however, that the fact that the settlement has already been approved in Quebec and British Columbia would have to be considered as a factor making changes unlikely in this case.

11 With respect to specific objections raised by the objectors, there is an additional factor to be kept in mind. The role of the court is to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member. As approval is sought at the same time as certification, even if the settlement is approved, class members will be afforded the right to opt out. There is, accordingly an element control that may be exercised to alleviate matters of particular concern to individual class members.

12 Various definitions of "reasonableness" were offered in argument. The word suggests that there is a range within which the settlement must fall that makes some allowance for differences of view, as an American court put it "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion". (*Newman v. Stein*, 464 F.2d 689, (U.S. 2nd Cir. N.Y. 1972) at 693).

(c) Factors to be considered by the court for approval of the agreement

13 A leading American text, *Newberg on Class Actions*, (3rd ed), para 11.43 offers the following useful list of criteria:

1. Likelihood of recovery, or likelihood of success

2. Amount and nature of discovery evidence

3. Settlement terms and conditions

4. Recommendation and experience of counsel

5. Future expense and likely duration of litigation

6. Recommendation of neutral parties if any

7. Number of objectors and nature of objections

8. The presence of good faith and the absence of collusion

14 I also find the following passage from the judgment of Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.), at 230-1 to be most helpful. Callaghan A.C.J.H.C.was considering approval of a settlement in a derivative action, but his comments are equally applicable to the approval of settlements of class actions:

> In approaching this matter, I believe it should be observed at the outset that the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.
>
> In deciding whether or not to approve a proposed settlement under s. 235(2) of the Act, the court must be satisfied that the proposal is fair and reasonable to all shareholders. In considering these matters, the court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of

upper and lower limits.

In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal.

The court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement.

. . . . .

The matter was aptly put in two American cases that were cited to me in the course of argument. In a decision of the Federal Third Circuit Court in *Yonge v. Katz*, 447 F.2d 431 (1971), it is stated:

> It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement. Such procedure would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh the nature of the claim, the possible defences, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.

In another case cited by all parties in these proceedings, *Greenspun v. Bogan*, 492 F.2d 375 at p. 381 (1974) , it is stated:

> ... any settlement is the result of a compromise — each party surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial. See *United Founders Life Ins. Co. v. Consumer's National Lifel Ins. Co.*, 447 F. 2d 647 (7th Cir. 1971); *Florida Trailer & Equipment co. v. Deal*, 284 F. 2d 567, 571 (5th Cir. 1960). *It is only when one side is so obviously correct in its assertions of law and fact that it would be clearly unreasonable to require it to compromise to the extent of the settlement, that to approve the settlement would be an abuse of discretion.* (Emphasis added)

15 It is apparent that the court cannot exercise its function without evidence. The court is entitled to insist on sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances.

16 In the arguments presented by the proponents of the settlement, considerable emphasis is placed on the opinion of senior counsel that the settlement is fair and reasonable as an important factor. While I agree that the opinion of counsel is evidence worthy of consideration, it is only one factor to be considered. It does not relieve the parties proposing the settlement of the obligation to provide sufficient information to permit the court to exercise its function of independent approval. On the other hand, the court must be mindful of the fact that as the consequence of not approving the settlement is that the litigation may well continue, there are inherent constraints on the extent to which the parties can be expected to make complete disclosure of the strengths and weaknesses of their case.

(d) Procedures for and scope of objection

17 The *Class Proceedings Act, 1992*, s. 12 confers a general discretion on the court with respect to the conduct of class proceedings:

> 12. The court, on the motion or a party or class member, may make an order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

Section 14 provides for the participation of class members in the following terms:

> 14(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.
>
> (2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

18 As already noted, the order of Winkler J. required class members who wished to object to the settlement to file written objections. It remains to determine the procedural and other rights objectors have in relation to the approval process.

19 In general, the procedural rights of all participants in the approval process must reflect the nature of the process itself and the special role of the court. The matter cannot be viewed in strictly adversarial terms. The plaintiff and the defendant find themselves in common cause, seeking approval of the settlement. The objectors have their own specific concerns which, upon examination, may or may not be reflective of the interests of the class as a whole.

20 In view of the fact that the purpose of the exercise is to ensure that the interests of the unrepresented class members are protected, the court is called upon to play a more active role than is called for in strictly adversarial proceedings. It is important that the court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other.

(i) Objectors' right to adduce evidence

21 I can see no reason why the objectors should not have the right to adduce evidence. However, given the interests of the objectors and the nature of the process, the right to adduce evidence is not at large. Any evidence adduced by the objectors must be relevant to the points they have raised by way of objection. It must also be adduced in a timely fashion. I direct that any evidence be adduced by way of affidavit filed at least 30 days prior to the date set for the hearing of this motion.

(ii) Objectors' right to discovery

22 Under the Rules of Court, the right to oral discovery and production of documents is restricted to parties to an action. The objectors are not parties to the action, and accordingly have no right to oral discovery or production of documents.

23 On the other hand, s. 14(2) of the Act does provide that participation "shall be in whatever manner and on whatever terms ... the court considers appropriate". On behalf of the objectors he represents, Mr. Deverett

sought the right to conduct essentially a "no holds barred" discovery of the parties to the action. He submitted that as no discovery had been conducted, it was impossible to assess the merits of the case and the settlement without one. In my view, this submission misses the whole point of the settlement approval exercise. The very purpose of the settlement at an early stage of the proceedings is to avoid the cost and delay involved in discovery and other pre-trial procedures. If Mr. Deverett is right, then a class action could almost never be settled without discovery, for if the parties did not conduct one, an objector could insist upon doing so as a precondition of settlement. This would create a powerful disincentive to early settlements by the parties and would run counter to the general policy of the law which strongly favours early resolution of disputes. On the other hand, the lack of discovery is a factor the court may take into account in assessing the fairness of the settlement. However, the remedy in a case where the court concludes that the settlement cannot be approved without a discovery is to refuse to approve the settlement and not to have one conducted by an objector. Given the very different in approach to discovery in the United States, I do not find the American authorities cited by the objectors on this point to be persuasive.

24 The objectors represented by Mr. Will seek production of certain specific documents relevant to their claims. This request has to be assessed in the light of the settlement agreement itself. An important element of the settlement agreement is a process to resolve individual claims. One aspect of that process will entitled these objectors to production of documents. The process will also permit them to opt out of the settlement after they receive production. In my view, in light of the process contemplated by the settlement agreement, these objectors are not entitled to insist upon production of documents at this stage. The point of the approval process is to determine whether the settlement is fair, reasonable and in the best interests of those affected by it. The issue for the court, then, is to assess whether the process contemplated by the settlement agreement is a fair one. I fail to see what relevance documents pertaining to the claims of these objectors have at this stage or how they would assist the court in determining whether the settlement and the process it specifies is a fair one.

25 Accordingly, in the circumstances of this case, I find that it is not appropriate to grant the objectors the right to oral or documentary discovery.

(iii) Right to cross-examine

26 The objectors also seek a general right to cross-examine on the affidavits filed in support of approval of the settlement. There is not inherent right to cross-examine: see eg. *Kevork v. R.*, [1984] 2 F.C. 753 (Fed. T.D.) On the other hand, it is important that there be some way for the court to ensure that evidence on contentious points can be probed and tested. As I have already stated, I view the approval process as one which the court must control and in which the court must take an active role. In keeping with that principle, and in view of the extremely open-ended request made by the Deverett objectors, I direct as follows:

(1) that any cross-examination of deponents shall take place *viva voce* before the court on the dates set for the hearing of the certification/approval motion;

(2) that any party or objector who wishes to cross-examine a deponent serve and file at least 10 days prior to the motion a written outline of the matters upon which cross-examination is requested;

(3) that the nature and extent of cross-examination shall, subject to the discretion of the court, only be in an area indicated by the written outline and shall be subject to the discretion of the court to exclude such cross-examination which may be exercised either before or during the hearing of the motion;

(4) that any deponent for which cross-examination is requested shall be available to attend court on the days the motion is to be heard as if under summons;

(5) that in any event, Mr Ritchie be in attendance for the motion;

(6) that the right of the court to question witnesses shall remain within the sole discretion of the court and shall not be in any way affected by para (2).

(e) Costs consequences

27 The Deverett objectors seek an order that they not be subject to any order as to costs and that they be awarded interim costs. It was suggested, in the alternative, by Mr. Will that I specify in advance the circumstances which would or would not lead to an adverse costs order.

28 In my view, no such orders or directives should be made. Nothing has been shown that would bring this case within the category of "very exceptional cases" contemplated by *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.) as justifying an award of interim costs to ensure that the objectors are able to continue their participation. Section 32(1) of the Act, which provides that class members are not liable for costs except with respect to the determination of their own claims, does not apply. That provision contemplates the usual situation where a class member takes no active step in the proceedings. The objectors are subject to the discretion conferred by s. 14(2), which expressly preserves the right of the court to impose appropriate terms as to costs.

29 It is important that, as one means of controlling the process, the court retain its discretion with respect to the costs of this process. I hardly need add that my discretion is to be exercised in accordance with an established body of law dealing with cost orders. That body of law recognizes the right of the court to award costs to compensate for or sanction inappropriate behaviour by a litigant. It also recognizes that in certain cases, departure from the ordinary rule that an unsuccessful pay the costs of the winner may be appropriate: see eg. *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. Gen. Div.).

Conclusion

30 If there are further procedural issues which arise prior to the hearing of the motion, I may be spoken to.

Order accordingly.

END OF DOCUMENT

TAB 16

C

2010 CarswellOnt 5510, 2010 ONSC 4209, 70 C.B.R. (5th) 1

Canwest Global Communications Corp., Re

IN THE MATTER OF SECTION 11 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS AND THE OTHER APPLICANTS

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: July 28, 2010
Docket: CV-09-8396-00CL

Counsel: Lyndon Barnes, Jeremy Dacks, Shawn Irving for CMI Entities

David Byers, Marie Konyukhova for Monitor

Robin B. Schwill, Vince Mercier for Shaw Communications Inc.

Derek Bell for Canwest Shareholders Group (the "Existing Shareholders")

Mario Forte for Special Committee of the Board of Directors

Robert Chadwick, Logan Willis for Ad Hoc Committee of Noteholders

Amanda Darrach for Canwest Retirees

Peter Osborne for Management Directors

Steven Weisz for CIBC Asset-Based Lending Inc.

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Debtors were group of related companies that successfully applied for protection under Companies' Creditors

Arrangement Act — Competitor agreed to acquire all of debtors' television broadcasting interests — Acquisition price was to be used to satisfy claims of certain senior subordinated noteholders and certain other creditors — All of television company's equity-based compensation plans would be terminated and existing shareholders would not receive any compensation — Remaining debtors would likely be liquidated, wound-up, dissolved, placed into bankruptcy, or otherwise abandoned — Noteholders and other creditors whose claims were to be satisfied voted overwhelmingly in favour of plan of compromise, arrangement, and reorganization — Debtors brought application for order sanctioning plan and for related relief — Application granted — All statutory requirements had been satisfied and no unauthorized steps had been taken — Plan was fair and reasonable — Unequal distribution amongst creditors was fair and reasonable in this case — Size of noteholder debt was substantial and had been guaranteed by several debtors — Noteholders held blocking position in any restructuring and they had been cooperative in exploring alternative outcomes — No other alternative transaction would have provided greater recovery than recoveries contemplated in plan — Additionally, there had not been any oppression of creditor rights or unfairness to shareholders — Plan was in public interest since it would achieve going concern outcome for television business and resolve various disputes.

Cases considered by *Pepall J.*:

Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) — referred to

A&M Cookie Co. Canada, Re (2009), 2009 CarswellOnt 3473 (Ont. S.C.J. [Commercial List]) — referred to

Armbro Enterprises Inc., Re (1993), 1993 CarswellOnt 241, 22 C.B.R. (3d) 80 (Ont. Bktcy.) — considered

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Beatrice Foods Inc., Re (1996), 43 C.B.R. (4th) 10, 1996 CarswellOnt 5598 (Ont. Gen. Div. [Commercial List]) — referred to

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 3702 (Ont. Gen. Div. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — referred to

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — considered

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

Canadian Airlines Corp., Re (2000), 88 Alta. L.R. (3d) 8, 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 4 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

Laidlaw, Re (2003), 39 C.B.R. (4th) 239, 2003 CarswellOnt 787 (Ont. S.C.J.) — referred to

MEI Computer Technology Group Inc., Re (2005), 2005 CarswellQue 13408 (Que. S.C.) — referred to

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

Uniforêt inc., Re (2003), 43 C.B.R. (4th) 254, 2003 CarswellQue 3404 (Que. S.C.) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 173 — considered

s. 173(1)(e) — considered

s. 173(1)(h) — considered

s. 191 — considered

s. 191(1) "reorganization" (c) — considered

s. 191(2) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 2(1) "debtor company" — referred to

s. 6 — considered

s. 6(1) — considered

s. 6(2) — considered

s. 6(3) — considered

s. 6(5) — considered

s. 6(6) — considered

s. 6(8) — referred to

s. 36 — considered

APPLICATION by debtors for order sanctioning plan of compromise, arrangement, and reorganization and for

related relief.

***Pepall J.*:**

1 This is the culmination of the *Companies' Creditors Arrangement Act*[FN1] restructuring of the CMI Entities. The proceeding started in court on October 6, 2009, experienced numerous peaks and valleys, and now has resulted in a request for an order sanctioning a plan of compromise, arrangement and reorganization (the "Plan"). It has been a short road in relative terms but not without its challenges and idiosyncrasies. To complicate matters, this restructuring was hot on the heels of the amendments to the CCAA that were introduced on September 18, 2009. Nonetheless, the CMI Entities have now successfully concluded a Plan for which they seek a sanction order. They also request an order approving the Plan Emergence Agreement, and other related relief. Lastly, they seek a post-filing claims procedure order.

2 The details of this restructuring have been outlined in numerous previous decisions rendered by me and I do not propose to repeat all of them.

The Plan and its Implementation

3 The basis for the Plan is the amended Shaw transaction. It will see a wholly owned subsidiary of Shaw Communications Inc. ("Shaw") acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("CTLP") and its subsidiaries and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities. Shaw will pay to CMI US $440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders (the "Noteholders") against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount of US $2.9 million per month will be paid to CMI by Shaw and allocated by CMI to the Noteholders. An additional $38 million will be paid by Shaw to the Monitor at the direction of CMI to be used to satisfy the claims of the Affected Creditors (as that term is defined in the Plan) other than the Noteholders, subject to a pro rata increase in that cash amount for certain restructuring period claims in certain circumstances.

4 In accordance with the Meeting Order, the Plan separates Affected Creditors into two classes for voting purposes:

> (a) the Noteholders; and
>
> (b) the Ordinary Creditors. Convenience Class Creditors are deemed to be in, and to vote as, members of the Ordinary Creditors' Class.

5 The Plan divides the Ordinary Creditors' pool into two sub-pools, namely the Ordinary CTLP Creditors' Sub-pool and the Ordinary CMI Creditors' Sub-pool. The former comprises two-thirds of the value and is for claims against the CTLP Plan Entities and the latter reflects one-third of the value and is used to satisfy claims against Plan Entities other than the CTLP Plan Entities. In its 16th Report, the Monitor performed an analysis of the relative value of the assets of the CMI Plan Entities and the CTLP Plan Entities and the possible recoveries on a going concern liquidation and based on that analysis, concluded that it was fair and reasonable that Affected Creditors of the CTLP Plan Entities share pro rata in two-thirds of the Ordinary Creditors' pool and Affected Creditors of the Plan Entities other than the CTLP Plan Entities share pro rata in one-third of the Ordinary

Creditors' pool.

6 It is contemplated that the Plan will be implemented by no later than September 30, 2010.

7 The Existing Shareholders will not be entitled to any distributions under the Plan or other compensation from the CMI Entities on account of their equity interests in Canwest Global. All equity compensation plans of Canwest Global will be extinguished and any outstanding options, restricted share units and other equity-based awards outstanding thereunder will be terminated and cancelled and the participants therein shall not be entitled to any distributions under the Plan.

8 On a distribution date to be determined by the Monitor following the Plan implementation date, all Affected Creditors with proven distribution claims against the Plan Entities will receive distributions from cash received by CMI (or the Monitor at CMI's direction) from Shaw, the Plan Sponsor, in accordance with the Plan. The directors and officers of the remaining CMI Entities and other subsidiaries of Canwest Global will resign on or about the Plan implementation date.

9 Following the implementation of the Plan, CTLP and CW Investments will be indirect, wholly-owned subsidiaries of Shaw, and the multiple voting shares, subordinate voting shares and non-voting shares of Canwest Global will be delisted from the TSX Venture Exchange. It is anticipated that the remaining CMI Entities and certain other subsidiaries of Canwest Global will be liquidated, wound-up, dissolved, placed into bankruptcy or otherwise abandoned.

10 In furtherance of the Minutes of Settlement that were entered into with the Existing Shareholders, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares, new subordinated voting shares and new non-voting shares; and (b) an unlimited number of new non-voting preferred shares. The terms of the new non-voting preferred shares will provide for the mandatory transfer of the new preferred shares held by the Existing Shareholders to a designated entity affiliated with Shaw for an aggregate amount of $11 million to be paid upon delivery by Canwest Global of the transfer notice to the transfer agent. Following delivery of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

11 Canwest Global, CMI, CTLP, New Canwest, Shaw, 7316712 and the Monitor entered into the Plan Emergence Agreement dated June 25, 2010 detailing certain steps that will be taken before, upon and after the implementation of the plan. These steps primarily relate to the funding of various costs that are payable by the CMI Entities on emergence from the CCAA proceeding. This includes payments that will be made or may be made by the Monitor to satisfy post-filing amounts owing by the CMI Entities. The schedule of costs has not yet been finalized.

Creditor Meetings

12 Creditor meetings were held on July 19, 2010 in Toronto, Ontario. Support for the Plan was overwhelming. 100% in number representing 100% in value of the beneficial owners of the 8% senior subordinated notes who provided instructions for voting at the Noteholder meeting approved the resolution. Beneficial Noteholders holding approximately 95% of the principal amount of the outstanding notes validly voted at the Noteholder meeting.

13 The Ordinary Creditors with proven voting claims who submitted voting instructions in person or by proxy represented approximately 83% of their number and 92% of the value of such claims. In excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors holding proven voting claims that were present in person or by proxy at the meeting voted or were deemed to vote in favour of the resolution.

Sanction Test

14 Section 6(1) of the CCAA provides that the court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double majority vote. The criteria that a debtor company must satisfy in seeking the court's approval are:

> (a) there must be strict compliance with all statutory requirements;
>
> (b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
>
> (c) the Plan must be fair and reasonable.
>
> See *Canadian Airlines Corp., Re*[FN2]

(a) Statutory Requirements

15 I am satisfied that all statutory requirements have been met. I already determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that they had total claims against them exceeding $5 million. The notice of meeting was sent in accordance with the Meeting Order. Similarly, the classification of Affected Creditors for voting purposes was addressed in the Meeting Order which was unopposed and not appealed. The meetings were both properly constituted and voting in each was properly carried out. Clearly the Plan was approved by the requisite majorities.

16 Section 6(3), 6(5) and 6(6) of the CCAA provide that the court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of Plan provides that the claims listed in paragraph (l) of the definition of "Unaffected Claims" shall be paid in full from a fund known as the Plan Implementation Fund within six months of the sanction order. The Fund consists of cash, certain other assets and further contributions from Shaw. Paragraph (l) of the definition of "Unaffected Claims" includes any Claims in respect of any payments referred to in section 6(3), 6(5) and 6(6) of the CCAA. I am satisfied that these provisions of section 6 of the CCAA have been satisfied.

(b) Unauthorized Steps

17 In considering whether any unauthorized steps have been taken by a debtor company, it has been held that in making such a determination, the court should rely on the parties and their stakeholders and the reports of the Monitor: *Canadian Airlines Corp., Re*[FN3].

18 The CMI Entities have regularly filed affidavits addressing key developments in this restructuring. In addition, the Monitor has provided regular reports (17 at last count) and has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any order of this court. If it was not obvious from the hearing on June 23, 2010, it should be stressed

that there is no payment of any equity claim pursuant to section 6(8) of the CCAA. As noted by the Monitor in its 16th Report, settlement with the Existing Shareholders did not and does not in any way impact the anticipated recovery to the Affected Creditors of the CMI Entities. Indeed I referenced the inapplicability of section 6(8) of the CCAA in my Reasons of June 23, 2010. The second criterion relating to unauthorized steps has been met.

(c) Fair and Reasonable

19 The third criterion to consider is the requirement to demonstrate that a plan is fair and reasonable. As Paperny J. (as she then was) stated in *Canadian Airlines Corp., Re*:

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.[FN4]

20 My discretion should be informed by the objectives of the CCAA, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons.

21 In assessing whether a proposed plan is fair and reasonable, considerations include the following:

(a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;

(b) what creditors would have received on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.

22 I have already addressed the issue of classification and the vote. Obviously there is an unequal distribution amongst the creditors of the CMI Entities. Distribution to the Noteholders is expected to result in recovery of principal, pre-filing interest and a portion of post-filing accrued and default interest. The range of recoveries for Ordinary Creditors is much less. The recovery of the Noteholders is substantially more attractive than that of Ordinary Creditors. This is not unheard of. In *Armbro Enterprises Inc., Re*[FN5] Blair J. (as he then was) approved a plan which included an uneven allocation in favour of a single major creditor, the Royal Bank, over the objection of other creditors. Blair J. wrote:

> "I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the court in interfering with the business decision made by the creditor class in approving the proposed Plan, as they have done. RBC's cooperation is a sine qua non for the Plan, or any Plan, to work and it is the only creditor continuing to advance funds to the applicants to finance the proposed reorganization."[FN6]

23 Similarly, in *Uniforêt inc., Re*[FN7] a plan provided for payment in full to an unsecured creditor. This treatment was much more generous than that received by other creditors. There, the Québec Superior Court sanctioned the plan and noted that a plan can be more generous to some creditors and still fair to all creditors. The creditor in question had stepped into the breach on several occasions to keep the company afloat in the four years preceding the filing of the plan and the court was of the view that the conduct merited special treatment. See also Romaine J.'s orders dated October 26, 2009 in *SemCanada Crude Company et al.*

24 I am prepared to accept that the recovery for the Noteholders is fair and reasonable in the circumstances. The size of the Noteholder debt was substantial. CMI's obligations under the notes were guaranteed by several of the CMI Entities. No issue has been taken with the guarantees. As stated before and as observed by the Monitor, the Noteholders held a blocking position in any restructuring. Furthermore, the liquidity and continued support provided by the Ad Hoc Committee both prior to and during these proceedings gave the CMI Entities the opportunity to pursue a going concern restructuring of their businesses. A description of the role of the Noteholders is found in Mr. Strike's affidavit sworn July 20, 2010, filed on this motion.

25 Turning to alternatives, the CMI Entities have been exploring strategic alternatives since February, 2009. Between November, 2009 and February, 2010, RBC Capital Markets conducted the equity investment solicitation process of which I have already commented. While there is always a theoretical possibility that a more advantageous plan could be developed than the Plan proposed, the Monitor has concluded that there is no reason to believe that restarting the equity investment solicitation process or marketing 100% of the CMI Entities assets would result in a better or equally desirable outcome. Furthermore, restarting the process could lead to operational difficulties including issues relating to the CMI Entities' large studio suppliers and advertisers. The Monitor has also confirmed that it is unlikely that the recovery for a going concern liquidation sale of the assets of the CMI Entities would result in greater recovery to the creditors of the CMI Entities. I am not satisfied that there is any other alternative transaction that would provide greater recovery than the recoveries contemplated in the Plan. Additionally, I am not persuaded that there is any oppression of creditor rights or unfairness to shareholders.

26 The last consideration I wish to address is the public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the business of the CTLP Plan Entities that fully and finally deals with the Goldman Sachs Parties, the Shareholders Agreement and the defaulted 8% senior subordinated notes. It will ensure the continuation of employment for substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

27 I should also mention section 36 of the CCAA which was added by the recent amendments to the Act which came into force on September 18, 2009. This section provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. The section goes on to address factors a court is to consider. In my view, section 36 does not apply to transfers contemplated by a Plan. These transfers are merely steps that are required to implement the Plan and to facilitate the restructuring of the Plan Entities' businesses. Furthermore, as the CMI Entities are seeking approval of the Plan itself, there is no risk of any abuse. There is a further safeguard in that the Plan including the asset transfers contemplated therein has been voted on and approved by Affected Creditors.

28 The Plan does include broad releases including some third party releases. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*[FN8], the Ontario Court of Appeal held that the CCAA court has jurisdiction to approve a plan of compromise or arrangement that includes third party releases. The *Metcalfe* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring. The Court held that the releases in question had to be justified as part of the compromise or arrangement between the debtor and its creditors. There must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan.

29 In the *Metcalfe* decision, Blair J.A. discussed in detail the issue of releases of third parties. I do not propose to revisit this issue, save and except to stress that in my view, third party releases should be the exception and should not be requested or granted as a matter of course.

30 In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. Fraud, wilful misconduct and gross negligence are excluded. I have already addressed, on numerous occasions, the role of the Noteholders and the Ad Hoc Committee. I am satisfied that the CMI Entities would not have been able to restructure without materially addressing the notes and developing a plan satisfactory to the Ad Hoc Committee and the Noteholders. The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they are considered by the Monitor to be fair and reasonable. Under the circumstances, I am prepared to sanction the Plan containing these releases.

31 Lastly, the Monitor is of the view that the Plan is advantageous to Affected Creditors, is fair and reasonable and recommends its sanction. The board, the senior management of the CMI Entities, the Ad Hoc Committee, and the CMI CRA all support sanction of the Plan as do all those appearing today.

32 In my view, the Plan is fair and reasonable and I am granting the sanction order requested. [FN9]

33 The Applicants also seek approval of the Plan Emergence Agreement. The Plan Emergence Agreement outlines steps that will be taken prior to, upon, or following implementation of the Plan and is a necessary corollary of the Plan. It does not confiscate the rights of any creditors and is necessarily incidental to the Plan. I have the jurisdiction to approve such an agreement: *Air Canada, Re*[FN10] and *Calpine Canada Energy Ltd., Re* [FN11] I am satisfied that the agreement is fair and reasonable and should be approved.

34 It is proposed that on the Plan implementation date the articles of Canwest Global will be amended to facilitate the settlement reached with the Existing Shareholders. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder approval or a dissent right. In particular, section 191(1)(c) provides that reorganization means a court order made under any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors. The CCAA is such an Act: *Beatrice Foods Inc., Re*[FN12] and *Laidlaw, Re*[FN13]. Pursuant to section 191(2), if a corporation is subject to a subsection (1) order, its articles may be amended to effect any change that might lawfully be made by an amendment under section 173. Section 173(1)(e) and (h) of the CBCA provides that:

> (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

(e) create new classes of shares;

(h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.

35 Section 6(2) of the CCAA provides that if a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

36 In exercising its discretion to approve a reorganization under section 191 of the CBCA, the court must be satisfied that: (a) there has been compliance with all statutory requirements; (b) the debtor company is acting in good faith; and (c) the capital restructuring is fair and reasonable: *A&M Cookie Co. Canada, Re*[FN14] and *MEI Computer Technology Group Inc., Re*[FN15]

37 I am satisfied that the statutory requirements have been met as the contemplated reorganization falls within the conditions provided for in sections 191 and 173 of the CBCA. I am also satisfied that Canwest Global and the other CMI Entities were acting in good faith in attempting to resolve the Existing Shareholder dispute. Furthermore, the reorganization is a necessary step in the implementation of the Plan in that it facilitates agreement reached on June 23, 2010 with the Existing Shareholders. In my view, the reorganization is fair and reasonable and was a vital step in addressing a significant impediment to a satisfactory resolution of outstanding issues.

38 A post-filing claims procedure order is also sought. The procedure is designed to solicit, identify and quantify post-filing claims. The Monitor who participated in the negotiation of the proposed order is satisfied that its terms are fair and reasonable as am I.

39 In closing, I would like to say that generally speaking, the quality of oral argument and the materials filed in this CCAA proceeding has been very high throughout. I would like to express my appreciation to all counsel and the Monitor in that regard. The sanction order and the post-filing claims procedure order are granted.

Application granted.

FN1 R.S.C. 1985, c. C-36 as amended.

FN2 2000 ABQB 442 (Alta. Q.B.) at para. 60, leave to appeal denied 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)].

FN3 Ibid,at para. 64 citing *Olympia & York Developments Ltd. v. Royal Trust Co.*, [1993] O.J. No. 545 (Ont. Gen. Div.) and *Cadillac Fairview Inc., Re*, [1995] O.J. No. 274 (Ont. Gen. Div. [Commercial List]).

FN4 Ibid, at para. 3.

FN5 (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.).

FN6 *Ibid*, at para. 6.

FN7 (2003), 43 C.B.R. (4th) 254 (Que. S.C.).

FN8 (2008), 92 O.R. (3d) 513 (Ont. C.A.).

FN9 The Sanction Order is extraordinarily long and in large measure repeats the Plan provisions. In future, counsel should attempt to simplify and shorten these sorts of orders.

FN10 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]).

FN11 (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.).

FN12 (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]).

FN13 (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.).

FN14 [2009] O.J. No. 2427 (Ont. S.C.J. [Commercial List]) at para. 8/

FN15 [2005] Q.J. No. 22993 (Que. S.C.) at para. 9.

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COURT FILE NO.: CV-06-3257-00
DATE: 20080506

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARVIN NEIL SILVER and CLIFF COHEN

Plaintiffs

v.

IMAX CORPORATION, RICHARD L. GELFOND BRADLEY J. WECHSLER and FRANCIS T. JOYCE

Defendants

Proceeding under the *Class Proceedings Act, 1992*

BEFORE: van RENSBURG J.

COUNSEL: D. Lascaris and M. Robb, for the Plaintiffs

D. Peebles and L. Lung, for the Respondents (Defendants and Proposed Defendants)

ENDORSEMENT

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van Rensburg J.

DATE: May 6, 2008

Tab 17

DATE: 20060621
DOCKET: C44065

COURT OF APPEAL FOR ONTARIO

GILLESE, BLAIR and JURIANSZ JJ.A.

B E T W E E N :	
THE TRUSTEES OF THE ONTARIO SERVICE EMPLOYEES UNION PENSION TRUST FUND, individually and on behalf of all other persons similarly situated	**Joseph M. Steiner and Christopher P. Naudie for the appellants**
Applicant (Respondent in Appeal)	**Kirk Baert and Celeste Poltak for the respondent, The Trustees of the Ontario Service Employees Union Pension Trust Fund**
- and -	
RICHARD CLARK, MARK WAYLAND and DELOITTE & TOUCHE LLP	**Jennifer Teskey for the respondent Nortel Networks Corp.**
Respondents (Appellants in Appeal)	
- and -	
NORTEL NETWORKS CORP.	
Respondent (Respondent in Appeal)	**Heard: January 24, 2006**

On appeal from the Judgment of Justice Mary Anne Sanderson of the Superior Court of Justice, dated July 25, 2005.

R.A. BLAIR J.A.:

Overview

[1] The Trustees of the Ontario Service Employees Union Pension Trust Fund ("OPT") are the plaintiffs in a U.S. federal securities fraud class proceeding commenced in New York against Nortel Networks Corp. ("Nortel") and certain individuals. Deloitte & Touche LLP ("Deloitte") is Nortel's independent auditor.

[2] OPT applied for, and obtained, letters rogatory in the U.S. Class Action requesting the cooperation of the Superior Court of Justice in Ontario in compelling the production of a wide range of documentation from Deloitte, as well as the *viva voce* examination of Richard Clark and Mark Wayland. Mr. Clark was the lead audit partner with Deloitte and Mr. Wayland was the audit manager with respect to the Nortel engagement. On July 25, 2005, Justice Sanderson granted an order enforcing the letters rogatory in their entirety.

[3] Deloitte appeals that order.

Facts

[4] In the U.S. Class Action, OPT alleges that Nortel made false or misleading public statements concerning its financial condition and performance during the period October 24, 2000 to February 15, 2001 ("the class period"). It is alleged that when Nortel subsequently disclosed its true financial condition, the value of its shares declined substantially and OPT suffered significant losses. OPT states that Nortel caused its public statements to be false or misleading by the deliberate use of five improper financial reporting and accounting practices in relation to its third and fourth quarters of 2000, namely:

- Improper vendor financing – inadequately reserving for vendor-financed loans and artificially inflating and improperly recognizing revenues;
- Improper inventory valuation – failing to take adequate charges against earnings to reflect the diminished value of its products recovered after defaults on vendor-financed loans, thereby inflating inventory value;
- Improper revenue recognition – inflating revenues by improperly and prematurely recognizing revenue;
- Failure to Account for Uncollectible Receivables; and
- Goodwill impairment – failing to recognize and report billions of dollars in goodwill impairment.

[5] Deloitte audited Nortel's year-end financial statements and reviewed its quarterly financial statements in the years 2000 and following. On December 23, 2003, Nortel issued a restatement of its financial statements for 2000, 2001, 2002 and certain quarters of 2003 ("the 2002 Restatement"). Later, in January 2005, it also re-filed audited financial statements for 2003 ("the 2003 Restatement").

[6] OPT wants to examine the audit documentation pertaining to these restatements and audits. It tried unsuccessfully to get access to the Canadian documentation through Deloitte U.S. OPT then subpoenaed Deloitte in the U.S. proceedings, but Deloitte did not respond to the U.S. subpoena. On the heels of these failed attempts it resorted to, and obtained, the letters rogatory from Magistrate Judge Dolinger of the United States District Court, Southern District of New York, on September 21, 2004.

[7] The contested provisions are paragraphs 11 and 15 of the letters rogatory. Paragraph 11 requests the production of the two representatives of Deloitte, Messrs. Clark and Wayland, for examination. Paragraph 15 requests the following documentation (the "Requested Documents"):

> (a) All working papers and other documents concerning Deloitte's audit of Nortel's financial statements for year-end 2000 and year-end 2001.
>
> (b) All workpapers and other documents concerning Deloitte's review of Nortel's financial statements for the third and fourth quarters of 2000 and the first quarter of 2001;
>
> (c) All workpapers and other documents concerning Deloitte's review of Nortel's financial statements for the second and third quarters of 2001, to the extent that such documents are related to a financial charge/write-down, in excess of $12 billion, as announced in Nortel's Form 10-Q for the quarterly period ending June 30, 2001, filed with the SEC on or about August 8, 2001;
>
> (d) All documents relating to Nortel's analysis of whether or not any transaction, customer, contract, arrangement or other such entry ([...]) during the class period included in Nortel's 2000 consolidated financial statements as originally filed with the SEC on March 31, 2001, was considered, and/or formed the basis for, any restatement of Nortel's financial statements...; and
>
> (e) All indices and/or inventories of work papers relating to any engagement or service performed by Deloitte for Nortel.

[8] Compliance with the demand for the Requested Documents will entail considerable time and effort, and expense, by Deloitte. Their affiant, Mr. Morrison, deposed that the requested documents number in the hundreds of thousands of pages, and possibly exceed a million pages. The documents are both in hardcopy and electronic form and are stored at various locations. Those relating to the 2000 and 2001 financial statements include over 400 working paper files, consisting mostly of documents in

electronic form. Deloitte generates and stores documents in electronic form using a software program (Audit System 2), which does not allow text searching across multiple documents or records. Users must open documents individually before examining and/or printing them. The requested documents also include more than a hundred thousand pages of personal desk files that are not organised by subject matter. Mr. Morrison estimated a minimum of fifteen hundred person-hours by Deloitte to conduct a file-by-file and document-by-document review for the purpose of identifying and segregating the relevant documents from the irrelevant materials.

[9] For its part, as noted by the application judge, OPT has offered to contribute up to $100,000 towards Deloitte's costs in this regard.

The Positions of the Parties

[10] The application judge ordered that the letters rogatory were to be enforced, subject to certain preconditions. The preconditions were that OPT and its counsel were to give their written undertakings:

> (a) that the documents and evidence produced pursuant to the judgment enforcing the letters rogatory would be used only for the purposes of the U.S. Class Action and not for the purposes of (i) adding Deloitte and/or Clark or Wayland as a party defendant to that action, or (ii) commencing any new proceedings against Deloitte and/or Clark or Wayland, or (iii) otherwise advancing any new claim against Deloitte and/or Clark and/or Wayland; and
>
> (b) that OPT and its counsel shall not provide documents and/or evidence produced pursuant to the judgment to any other person unless that other person acknowledges and undertakes to be bound by the foregoing provision.

[11] Deloitte asserts that most of the requested documents are not relevant, either temporally (they do not relate to the class period) or in subject matter (they do not relate to the improper accounting practices raised in the U.S. Class Action). Deloitte therefore seeks to set aside the judgment of Sanderson J. to the extent that it orders production of the work papers and other documents listed in subparagraphs (a) through (c) of the letters rogatory on the basis that it would require a massive and burdensome effort to review, identify, separate and produce relevant documents. Alternatively, Deloitte requests – for the first time on appeal – that sub-paragraphs 15(a) through (c) be narrowed to require production of only those particular sections of the working papers that have been identified as potentially containing relevant documents and that would not be

burdensome for Deloitte to produce. In short, Deloitte submits that the letters rogatory "are unjustifiably overbroad, unduly burdensome, and should not be enforced".[1]

[12] OPT argues that the evidence sought by it through the enforcement of the letters rogatory is of particular relevance to the U.S. Class Action, that the evidence is not otherwise obtainable, does not violate principles of Canadian public policy, was defined with reasonable particularity, and would not be unduly burdensome to Deloitte to produce. The respondent therefore submits that the application judge properly exercised her discretion to enforce the letters rogatory issued by the U.S. District Court. Nortel took no position at the application to enforce the letters rogatory and takes no position on this appeal.

[13] For the reasons that follow, I would dismiss the appeal.

Law and Analysis

[14] The court's authority to enforce letters rogatory is derived from s. 60 of the Ontario *Evidence Act*[2] and from s. 46 of the Canada *Evidence Act*.[3] The order is discretionary in nature.

[15] The application judge correctly, and succinctly, articulated the test to be applied in a proceeding for the enforcement of letters rogatory. Indeed, counsel before her agreed on the test. She said:

> All counsel agree on the criteria this Court should use in deciding whether or not the letters rogatory should be enforced. The evidence sought must be relevant, not otherwise obtainable and identified with reasonable specificity. The Canadian enforcement order must be consistent with Canadian public policy and must not be unduly burdensome. *OptiMight Communications Inc. v. Innovance Inc.*, [2002] O.J. No. 577 (C.A.) at para. 22, relying on *Re Friction Division Products Inc. and E.I. DuPont de Nemours & Co. et al.* (No. 2) (1986), 56 O.R. (2d) 722 at 732 [underlining added].

[16] This test is consistent with the principles also enunciated by this court in *Fecht v. Deloitte & Touche* (1997), 32 O.R. (3d) 417 (C.A.) and in *France (Republic) v. De Havilland Aircraft of Canada* (1991), 3 O.R. (3d) 705 (C.A.). See also *Zingre v. R.*, [1981] 2 S.C.R. 392. In *Fecht*, the court noted that the exercise of judicial discretion in

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[1] Deloitte factum, para 68.
[2] R.S.O. 1990, c. E.23.
[3] R.S.C. 1985, c. C-5.

the context of enforcing letters rogatory "requires the balancing of two broad considerations: the impact of the proposed order on Canadian sovereignty and whether justice requires that the taking of commission evidence be ordered" (p. 419). Impact on Canadian sovereignty in this sense refers to the imposition of an unfair burden on, or prejudice to, the non-party citizen of the requestee state who is the target of the request.

[17] The application judge considered and weighed all of the foregoing factors. She reviewed the submissions of the parties in relation to each of them and thereafter conducted her own analysis of those factors based on the record before her. Having done so, she found that:

> (a) the Requested Documents were "clearly relevant" and of "paramount evidentiary importance to the U.S. Class Action";
>
> (b) the requested testimony of Messrs. Clark and Wayland was "highly relevant" and that they possessed "unique and specific knowledge touching on the matters complained of";
>
> (c) the Requested Documents and Testimony were "crucial to the determination of the issues in the U.S. Class Action";
>
> (d) it would be unfair to the plaintiffs to require them to proceed to trial without the Requested Documents and the testimony and justice required the enforcement of the letters rogatory;
>
> (e) the Requested Documents were identified with sufficient specificity;
>
> (f) the documents generated by Deloitte in the course of the audits and restatements touching on the issues set out in the complaint "will be unique to Deloitte", and are therefore not available from other sources; and
>
> (g) the request for the documents was not unduly burdensome for Deloitte in the manner she ordered and subject to the undertakings given by OPT.

[18] On behalf of Deloitte, Mr. Steiner relies heavily on the decision at first instance, and on appeal, in *Fecht*. He submits the case cannot be distinguished from the present litigation. And, indeed, there are similarities. *Fecht* involved letters rogatory from the same U.S. District Court, in relation to a U.S. class proceeding alleging that a predecessor of Nortel had made falsely optimistic public statements about the company's performance, as a result of which its share prices had fallen dramatically. The letters rogatory sought the production of a wide-ranging set of documents from the same auditors, Deloitte & Touche. The request for an order enforcing the letters rogatory was

declined on the basis that the relevancy of the requested documentation had not been established (they were said only to be "potentially" relevant), that the request was overly burdensome on Deloitte, and that the applicant had not established a sufficiently substantial link to the foreign jurisdiction (Ontario) to conclude that justice required the enforcement of the letters rogatory. The decision was upheld on appeal.

[19] *Fecht* is distinguishable from the present case, however. In *Fecht*, the allegedly false and misleading statements related to primarily non-financial matters. There was one specific accounting related issue involving the write-down of goodwill, but it was held that the request for production was overly broad to respond to that particular issue. In short, Deloitte's link to the issues in the *Fecht* U.S. proceeding was nothing more than that it was Northern Telecom's general auditor, and some information in relation to the audit was "potentially relevant" to the lawsuit.

[20] Here, however, the allegations of false and misleading statements pertain directly to Nortel's financial statements, and its restatements. The complaint alleges that Nortel issued false and misleading public statements that overstated its financial condition and performance during the class period, and further that the statements included false and misleading information with respect to the nature and extent of the actual sales made by Nortel – all resulting in the artificial inflation of Nortel's stock price. Thus, allegations relating to improper financial reporting and accounting practices – as encapsulated in the five complaints referred to above – are at the heart of the U.S. Class Action. Deloitte prepared both the financial statements and the restatements that are in issue and was directly involved in the restatement process. Moreover, Nortel specifically defends on the grounds that it relied on the advice of its advisors, thus putting the contents of Deloitte's working papers and other documentation in issue, as the application judge noted.

[21] The case management judge in the U.S. Class Action made the order for production and testimony and requested the assistance of the Ontario court in enforcing the order on the bases, amongst others, that:

- The testimony sought is both relevant and probative, and thus it would be unfair to require the Class Plaintiffs to proceed to trial without obtaining this evidence;
- The Deloitte witnesses will have specific knowledge of facts that are directly relevant to the allegations;
- The documents and testimony sought are not otherwise available and are of paramount evidentiary importance to the case;

- Justice cannot be completely achieved among the parties without such evidence.

[22] I do not accept the appellants' criticism that the application judge accorded too much deference to the U.S. court's order. She correctly observed that she was not bound by the conclusions of the requesting judge, but that "his observations and conclusions are entitled to deference and respect." I agree with her view that an Ontario court should "'give full faith and credit' to the orders and judgments of a U.S. court unless it is of the view that to do so would be contrary to the interests of justice or would infringe Canadian sovereignty": see *Zingre v. R., supra*, at p. 401; *France (Republic) v. De Havilland Aircraft of Canada, supra*, at p. 715-716. At the end of the day, she arrived at her own findings and conclusions, as summarized above.

[23] The unseverable mix of relevant and irrelevant documents amongst the Requested Documents, together with the sheer volume of the production sought, is admittedly troubling in this case, as it was in *Fecht*. However, Deloitte is a major financial audit and consulting firm, worldwide. The application judge noted that it is obliged by professional standards to compile and secure its working papers in a manner in which they can be made available to regulatory entities and successor auditors. It should follow that the documentation is not impossible to prepare for production. Requests for the production of voluminous documentation, in electronic and hard copy form, are hardly unknown in today's world of complex general and class action litigation. In that sense, there is a certain "cost of doing business" element in the call for Deloitte to respond to the letters rogatory – an offset to the undoubtedly considerable revenues that the appellant earns from providing high level and complex auditing services to companies such as Nortel.

[24] Deloitte took an "all or nothing" approach before the application judge, contending that it would not be feasible to narrow the request by attempting to separate the relevant from the irrelevant in the circumstances – thereby tactically strengthening its argument based on "burdensomeness". On appeal, Deloitte attempted to resile from that position and argued that, if the court were to uphold the enforcement order, it should order one of a series of suggested options narrowing the production permitted under the letters rogatory. While it was open to the application judge to narrow the request, she was not invited to do so, on the basis that it was impracticable. In my view, fairness considerations preclude Deloitte from reversing that position now, on appeal.

[25] The application judge was satisfied that the Requested Documents had been identified by subject matter and timeframe, and that this was sufficiently specific in the circumstances. She was also satisfied that the requests for documents and for the testimony of Messrs. Clark and Wayland were not unduly burdensome or prejudicial to Deloitte, particularly in light of the undertakings given by OPT and the conditions that the application judge intended to impose. Applying the specific criteria set out in

OptiMight Communications and the more general principles synthesized in *Fecht* and in *France*, she concluded (reasons, para. 94):

> I am of the view that justice requires the production of the Specified Documents and Specified Evidence. I am satisfied that an order enforcing the letters rogatory in the form of Magistrate Judge Dolinger's order of September 21, 2004 is in the interests of justice. The evidence is indeed relevant, crucial and otherwise unavailable. Its production in the manner ordered will not be unduly burdensome to Deloittes. Given the undertakings of the Applicants and the pre-existing confidentiality agreements and protective orders, Deloittes' interests will not be unduly prejudiced in a manner that would infringe Canadian sovereignty.

[26] This was a discretionary decision and is entitled to considerable deference. I see no palpable or overriding error on the part of the application judge in the findings she made and no error in principle justifying interference on the part of this court.

Disposition

[27] I would dismiss the appeal.

[28] The respondent Trustees are entitled to their costs of the appeal, fixed in the amount of $20,000 all inclusive.

"R.A. Blair J.A."
"I agree E.E. Gillese J.A."
"I agree R.G. Juriansz J.A."

RELEASED: June 21, 2006

Tab 18

COURT FILE NO.: 12023/01
DATE: 20080916

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Wilfred Robert Pearson - and - Inco Limited

BEFORE: Justice Cullity

COUNSEL: ***Kirk Baert*** and ***Celeste Poltak*** - for the plaintiff

Laura Fric - for the defendant

DATE HEARD: September 11, 2008

ENDORSEMENT

[1] The parties moved to compel answers to numerous refusals and undertakings provided at the examinations for discovery of Mr Pearson and of a representative of Inco Limited ("Inco"). The great majority of the issues that have arisen were resolved by the parties before the hearing on September 11, 2008 and a consent order was signed on that occasion.

[2] For the main part the unresolved issues involved claims for privilege by each of the parties. Nine of these concerned redacted portions of documents produced by Inco for which solicitor and client privilege was claimed. After reviewing the documents and hearing the submissions of the parties, I upheld a claim for privilege with respect to each redaction on the ground that it was a confidential communication between Inco and its internal, or external, solicitors either as legal advice, or for the purpose of providing it.

[3] The most doubtful of these claims for privilege related to 2 redacted pages that were mistakenly identified as part of a non-privileged document. These pages were prepared by a consulting firm at the request of Inco's legal counsel for the purpose of providing legal advice to Inco with respect to litigation - but not, I was informed, this litigation. There is no evidence as to the nature of the litigation in question, but any litigation privilege attaching to the documents would not have survived it unless it was closely related to this proceeding: *Blank v. Canada*, [2006] S.C.J. No. 39. In the absence of evidence on either of these points, and I ruled that a claim for litigation privilege had not been substantiated. Nevertheless, after some hesitation, I indicated at the hearing that I accepted Ms Fric's submission that the redacted pages were covered by solicitor-and-client privilege as communications made to Inco's solicitor in confidence by an agent of Inco for the purpose of legal advice to be provided to Inco.

[4] Having given this matter further consideration, I am of the opinion that the conclusion I reached at the hearing is not correct and that the evidence is insufficient to establish the privilege.

[5] Apart from inferences to be drawn from my review of the documents in question, the evidence consists entirely of a sworn statement by one of the defendant's counsel that to the best to the best of his firm's knowledge,

> ... the redacted pages were prepared by a consulting firm at the request of Inco's internal legal counsel, Julie Lee Harris, for the purpose of providing legal advice to Inco in or about the year 2002.

[6] It is established that some - but not all - communications by a third party to a solicitor for the purpose of enabling, or assisting, the solicitor to provide legal advice to a client will be privileged: *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.), at page 352 *per* Doherty J.A., (Carthy and Rosenberg JJ.A. concurring, at pages 339 and 369, in the learned judge's analysis of solicitor – client privilege). In *Chrusz* it was held that the fact that the third party is properly described as an agent under the general law of agency is, in itself, not determinative that the privilege exists: *per* Doherty J.A. at page 356. It was held, further, that a communication would attract the privilege if the third party should be considered to be a line, or channel, of communication under which the third party carried information from the client to the solicitor, or assembled and explained, or interpreted, information provided by the client in order to make it relevant to the legal issues upon which advice was sought: *per* Doherty J.A. pages 353 – 4.

[7] The Court of Appeal accepted that the existence of the privilege is not limited to the situations just mentioned. The principles that are to be applied in other cases were set out on pages 356 - 357 by Doherty J.A. as follows:

> I think that the applicability of client-solicitor privilege to third-party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.
>
> Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from a solicitor on behalf of a

> client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.
>
> If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.

[8] Having reviewed the relevant documents in the light of the sworn evidence and Ms Fric's submissions, I do not consider that the third party was merely a channel of communication between Inco and its solicitor, or that it was merely interpreting information provided by Inco. To the extent that I am able to ascertain from the documents and the evidence – such as it is - the third party was retained by Inco's in-house counsel to gather - and, possibly, interpret - information from outside sources for the purposes of assisting counsel to provide legal advice to Inco. This conclusion is not excluded by the affidavit evidence of the solicitor acting for Inco in this litigation. If not otherwise excluded, litigation privilege – but not solicitor-client privilege – could attach to the documents. In *Chrusz,* at page 358, Doherty J.A. emphasised the need to preserve the boundaries of solicitor-client privilege and litigation privilege in cases of third party communications.

[9] In consequence, the defendant has not, in my opinion, discharged its burden of establishing that this claim for privilege should be upheld. The opinion I expressed at the hearing is rescinded and the claim will be denied.

[10] Inco also requested an order directing Mr Pearson to request from two of his neighbours a copy of documentation they received from the Ministry of Environment on September 20, 2000 that disclosed very high levels of nickel contamination on their property. This request was refused by the plaintiff on the ground that examination for discovery of class members other than the representative plaintiffs requires court approval. The document requested represents the first of a series of disclosures of contamination that are alleged to have directly caused the devaluation of the properties of class members and it is of some importance in the litigation. It was not disputed that the neighbours, or one of them, have been assisting the plaintiff in the litigation. They are members of the class in the proceeding and I am satisfied that I have jurisdiction to make the order requested pursuant to section 12 of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6, as well as otherwise. I indicated at the hearing that I would do so and thereby obviate the need for a subsequent motion for leave to discover one of the neighbours.

[11] The last matter to be considered was Inco's request for disclosure of relevant facts obtained from residents of the area by a summer student employed by class counsel. It was not disputed that the information was obtained for the sole purpose of this litigation.

[12] Initially, Ms Fric requested an order compelling production of all of the student's notes and memoranda that identified his informants and recorded his discussions with them. I declined this request on the ground that the notes were subject to litigation privilege. Ms Fric then submitted that, notwithstanding this, Inco was entitled to disclosure of the facts obtained by the student and recorded in his notes. This proposition was challenged by Mr Baert on the ground that disclosure would, in effect, emasculate the privilege attaching to the notes.

[13] The issue that arises is whether Rule 36.01 requires Mr Pearson to disclose facts relating to issues in the action when privileged documents are the source of his information.

[14] In Hubbard, Magotiaux and Duncan, *The Law Of Privilege in Canada*, at paragraph 12.230, (Canada Law Book, looseleaf), the learned authors state that there are conflicting authorities on the question. While they do not cite any decisions from Ontario, I believe there is, at least, an apparent conflict. Whether or not this can be explained by differences in the rules of practice in force in different provinces, it is, I believe, clear that divergent views have been expressed on where the line should be drawn between the dictates of litigation privilege and the desire to assure a trial on all the relevant facts. Decisions of the Court of Queen's Bench of Alberta and the Court of Appeal of Manitoba are in favour of the extension of the litigation privilege to facts that a party being discovered has obtained only from documents prepared by counsel or their agents for the purpose of litigation. The cases include *Blair v. Wawanesa Mutual Insurance Company*, [2000] A.J. 728; *Lytton v. Alberta*, [1999] A.J. No. 457; *The Sovereign General Insurance Company v. Tanar industries Ltd*, [2002] A.J. 107; and *Chmara v. Nguyen*, [1993] M.J. No. 274 (C.A.). In these cases I understand the courts to have accepted and found compelling the same proposition that was advanced by Mr Baert in this case. Disclosure would, in the words of the court in *Chmara,* "fatally maim the litigation privilege rule".

[15] I am satisfied that the authorities in Ontario do not endorse that proposition. The effect of the cases before the present Rules of Civil Procedure came into force was summarised by Professor Robert J. Sharpe in *Claiming Privilege in the Discovery Process* (Special Lectures of the Law Society of Upper Canada, 1984), at page 169:

> It is well established in the case law that where a party on discovery has asked for facts relating either to his own case or to that of his opponent, those facts must be revealed, not withstanding that the party's source of information is a privileged report or document.

[16] One of the cases cited by Professor Sharpe (now Sharpe J.A.) was *April Investments Ltd. v. Menat Construction Ltd.* (1975), 11 O.R. (2d) 364 (H.C.J.) in which Pennell J. rejected the proposition that a party was entitled to refuse to disclose factual conclusions in a privileged report of an investigator. The learned judge stated:

> In considering the merits of the present application I have no intent to put the privilege attaching to the engineering reports to flight but there is need to preserve the purpose of an examination for discovery. I think there is a distinction between disclosure of privileged information and divulging the facts which are relied upon though the facts may be contained in a privileged document. The tendency of the courts is not to circumscribe the avenues of discovery but to widen them: *Henderson v. Mercantile Trust Co.* (1922), 52 O.L.R. 198.

[17] The scope of oral discovery is now significantly wider under rule 36.01 than it was at the time of the decision in *April Investments* and there is, I believe, a consistent line of authorities that explicitly, or implicitly, support the conclusions of principle in that case. The cases include: *Sacrey v. Burdan*, [1986] O.J. No. 2575 (Dist. Ct.); *Dionisopoulos v. Provias*, [1990] O.J. No. 30 (H.C.J.); and Murray *v. Woodstock General Hospital Trust*, [1988] O.J. 1767 (Div. Ct); see also, *Susan Hosiery Ltd v. Minister of National Revenue*, [1969] C.T.C. 353 (Ex. Ct.), at page 361.

[18] Similar views have been expressed in the context of solicitor and client privilege: see for example, *Chrusz*, at page 347 *per* Doherty J.A.; and *Canadian Pacific Ltd. v. Canada*, [1995] O.J. No. 4148 (G.D.), at page 3, *per* Farley J..

[19] In *Sacrey*, Borins Dist.Ct.J. (now Borins J.A.) stated, at para 12:

> It is also important to distinguish between discovery of documents, provided by R. 30, and discovery of information, provided by R. 31. It was submitted by the defendant that the plaintiff was not entitled to discovery of the information which it seeks on the ground that it is privileged. This, in my view, is incorrect and results from an attempt to apply the provisions of subr. 30.03 (2) (b) and, perhaps, r. 30.09, to r. 31.06. As indicated earlier, in her affidavit of documents the defendant objects to the production of the report of Equifax Services Ltd. on the ground that it is privileged as it was prepared in contemplation of litigation. However, the plaintiff does not seek discovery of the report. Subrules 31.06 (1) to (3) enable a party to obtain on examination for discovery much of the information contained in a document which is protected from production or discovery on the ground of privilege. Pursuant to these subrules the examining party is entitled to be told of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or a occurrences in issue, the substance of their expected evidence and, at unless an undertaking is given not to call an expert as a witness at trial, the names and addresses of experts, engaged by or on behalf of the party examined, together with the findings, opinions and conclusions of the expert. But witness statements and, subject

> to r. 53.03, expert's reports remain privileged from production as constituting part of the lawyer's work product and being a document prepared in contemplation of litigation respectively.

[20] *Sacrey* and other decisions from Ontario were cited and followed in *Llewellyn v. Carter*, [2008] P.E.I.J. No. 38 (C.A.) where, in allowing an appeal, McQuaid J.A. concluded (at paras 44 and 57):

> 44. The Ontario courts give a plain meaning to rule 31.06 and a meaning that can be reconciled with rule 30 which permits a claim for privilege over a document itself. Rule 31.06 means that information relevant to matters in issue must be disclosed in oral discovery, and to this extent the right of litigation privilege has been abrogated. Documents remain protected from disclosure but the evidence in a particular document which is relevant to the proof of the facts in the matter must be disclosed in accordance with Rule 31.06. ...
>
> 57. In summary, for the reasons I have set forth above and based on a consideration of the above authorities, I accept the plain meaning interpretation given by the Ontario courts to the rules on documentary disclosure and discovery examination. I specifically reject the approach taken by the Manitoba Court of Appeal in ***Chmara v. Nguyen***, supra and by the motions judge in ***Breau v. Naddy*** *{***[1995] P.E.I.J. No, 108 (P.E.I.S.C.)***}*. Like the motions judge in this case, these two authorities failed to recognise the distinction made by the ***Rules of Court*** between documentary disclosure in Rule 30 and the broader informational disclosure required by the plain terms of Rule 31. On the other hand, the reasoning of the Ontario courts, interpreting precisely the same rules applicable in this court, recognizes the distinction between the two forms of disclosure, the result being a fairer and more reliable civil litigation process.

[21] I am respectfully of the same opinion of the effect of the authorities in this jurisdiction. Accordingly, I am satisfied that, although Inco is not entitled to copies of the student's notes, it is entitled to disclosure of relevant facts contained in them. It is also entitled to the names and addresses of the student's informants pursuant to rule 36.06 (2).

[22] I have not been provided with a copy of the notes and, in consequence, I do not know whether they contain information that is not relevant to the issues in the action or anything of a non-factual nature that bears on the preparation of the plaintiff's case and should attract privilege on that ground. If a question arises with respect to the extent or form of the required disclosure, I may be spoken to.

CULLITY J.

DATE: September 16, 2008

Tab 19

CITATION: Sharma v. Timminco, 2010, ONSC 790
COURT FILE NO.: 09-CV-378701CP
Date: February 3, 2010

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Ravinder Kumar Sharma

Plaintiff

- and -

Timminco Limited, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Dr. Heinz Schimmerlbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich and John P. Walsh

Defendants

COUNSEL:
James Orr and Victoria Paris for the Plaintiff
Alan L.W. D'Silva, Daniel S. Murdoch, and Lesley Mercer for the Timminco defendants
Brendan van Nicjenhuis for the Phelan Defendants

HEARING DATE: January 28, 2010

REASONS FOR DECISION

PERELL, J.

[1] Under the *Class Proceedings Act, 1992,* S.O. 1992, c.5, Ravinder Kumar Sharma brings a proposed class action that involves, among other things, a common law negligent misrepresentation claim against the Timminco Ltd. Defendants and also a statutory misrepresentation claim under Part XXIII.1 of the *Ontario Securities Act.*, R.S.O. 1990, c. C.5. The statutory claim can be brought only with leave, and leave has not yet been obtained.

[2] Recently, there was a carriage motion, and Mr. Sharma's lawyers were successful, and a rival class action was stayed. See *Sharma v. Timminco Ltd.*, [2009] O.J. No. 4511 (S.C.J.). In the carriage motion, Mr. Sharma's lawyers stated that they had information about the insurance coverage available to some of the defendants in their proposed class action.

[3] After the carriage motion, notwithstanding having this information, Mr. Sharma's lawyers asked the Timminco Defendants to disclose any insurance policies that provided coverage for the litigation.

[4] The request by Mr. Sharma's lawyers was made soon after a press release raised concerns about the financial capability of Timminco Ltd. to continue as a going concern.

[5] The Timminco Defendants' lawyers responded that their clients would not agree to produce the policies unless ordered to do so

[6] Mr. Sharma now makes a motion for the production from the Timminco Defendants of their insurance policies and related information about coverage conditions.

[7] The Timminco Defendants resist the motion, and they have filed a voluminous reply record to rebut any inference that Timminco is in dire financial straits.

[8] Normally, insurance policies are disclosed in an affidavit of documents as an aspect of the documentary discovery stage of an action. Under rule 30.03 (1), "a party to an action shall serve on every other party an affidavit of documents disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession control or power."

[9] The presence of insurance is not necessarily relevant to any matter in issue, and rule 30.02 (3) addresses the production of insurance policies, as follows:

> 30.02 (3) A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,
>
> (a) to satisfy all or part of a judgment in the action; or
>
> (b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment,
>
> but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

[10] Rules 31.06 (4) and (5) address the matter of questions about insurance being asked during oral examinations for discovery. These rules state:

> 31.06 (4) A party may on an examination for discovery obtain disclosure of,
>
> (a) the existence and contents of any insurance policy under which an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment; and

> (b) the amount of money available under the policy, and any conditions affecting its availability.
>
> (5) No information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

[11] Formerly, the affidavit of documents was delivered within 10 days after the close of pleadings. Rule 30.03 (1) no longer specifies the timing, and instead, rule 29.1 sets out the requirement that the parties prepare a discovery plan. Under rule 29.1.03 (2), "the discovery plan shall be agreed to before the earlier of, (a) 60 days after the close of pleadings or such longer period as the parties may agree to; and (b) attempting to obtain the evidence."

[12] The proposed class action is some distance away from the close of pleadings and oral examinations for discovery. There are pending amendments to the statement of claim to add a new proposed representative plaintiff, and there is the yet to be arranged motion for leave under the *Ontario Securities Act* for the statutory misrepresentation claim, which, if granted, will precipitate further amendments to the statement of claim. Further, as in the case at bar, it is not uncommon in class proceedings that the statement of defence is not demanded until after the outcome of the certification motion is determined.

[13] Thus, technically speaking, Mr. Sharma's request for the insurance policy information is premature. However, there is precedent that supports the early production of insurance policies. In *Pysznyj v. Orsu Metals Corporation* (May 21, 2009, London File No. 59650CP), Justice Rady ordered insurance policies produced in a proposed class action. Further, it was conceded by the Timminco Defendants that under the court's authority provided by s. 12 of the *Class Proceedings Act, 1992*, the court has the jurisdiction to make an order requiring the production of the insurance policies at this early stage of the proceedings.

[14] Although the Timminco Defendants do not say that they would be harmed, prejudiced, or even inconvenienced by the early production of the insurance policies, they submit that the court ought not to make the production order for two reasons.

[15] First, the Timminico Defendants submit that the order should be made only in extraordinary circumstances; however, in the case at bar, they submit that given what Mr. Sharma's counsel already knows about the insurance coverage, there are no extraordinary circumstances. Moreover, the Timminco Defendants submit that an early order for production is unnecessary because Mr. Sharma and his lawyers already have all the information they currently need.

[16] Second, the Timminco Defendants submit that it would be contrary to the public policy associated with the proper operation of Part XXIII.1 of the *Ontario Securities Act* to order the production of the insurance information before the leave motion is decided.

[17] I disagree with both submissions.

[18] I see no basis in principal, precedent, or based on the facts of this case for the conclusion that the early production of the insurance policies must be justified by extraordinary or special circumstances.

[19] Although Mr. Sharma's lawyers have some knowledge about the insurance policies, that information is neither comprehensive nor adequate. Requiring disclosure of insurance information encourages the parties to make practical or pragmatic decisions about the likelihood of recovery on the claims, which, in turn, may influence their decisions about prosecuting or attempting to settle the litigation: *Sabatino v. Gunning* (1985), 50 O.R. (2d) 171 (C.A.); *Pysznyj v. Orsu Metals Corporation, supra.* With the patchy information available to them, Mr. Sharma's lawyers would be irresponsible if they provided advice or made a decision based on the current state of information. Similarly, if the availability of insurance coverage were to be a factor in settlement discussions, the current state of information is insufficient.

[20] But there is more to Mr. Sharma's request for information about insurance coverage. The information would be relevant to settlement discussions, but it is also relevant to whether it makes sense to prosecute the action. The relationship between the costs of litigation and the collectable amount of recovery is a matter of concern to a plaintiff and to his or her counsel acting under a contingency fee arrangement, and this concern is particularly intense in a proposed class proceeding where the costs and the risks associated with the litigation will be high.

[21] Putting aside for the moment, the Timminco Defendant's second reason for refusing to produce the insurance policies and the associated information, in my opinion, it would be productive to order their production.

[22] I shall move on to consider the Timminco Defendants' second submission, but, before doing so, it is necessary to address the matter of the relevance, if any, of the defendant's financial circumstances to Mr. Sharma's request for early disclosure of information about insurance policies. In my opinion, the financial health of the defendant is a neutral or irrelevant factor.

[23] While information about available insurance coverage might be more interesting in circumstances where a defendant is in poor financial health, the information remains useful and necessary regardless of the defendant's financial health. Thus, I need not and I do not make any finding about the financial health of Timminco Ltd. My opinion, which is independent of the financial status of the Timminco Defendants, is that there were good reasons for Mr. Sharma's lawyers to request early production of the insurance policies and apart from the public policy argument, to which I will turn next, there is no reason to refuse ordering the disclosure of the information now.

[24] The Timminco Defendants relied on the uncontested evidence of Mr. Thomas Allen to submit that early disclosure of insurance policies is inconsistent with the Legislature's intentions about the pursuit of a statutory misrepresentation claim under Part XXIII.1 of the *Ontario Securities Act.* Mr. Allen, who is a lawyer with a very admirable reputation in the investment industry and in the legal profession as securities

and corporate law lawyer, was the chair of a renowned committee of the Toronto Stock Exchange that did the pioneering work that eventually led to the Ontario Government enacting Part XXIII.1 of the *Act*. The Committee's work is commonly referred to as the "Allen Report." See TSE Committee on Corporate Disclosure, *Responsible Corporate Disclosure: A Search for Balance*, Final Report (Toronto: Toronto Stock Exchange, 1997).

[25] Mr. Sharma objected to the admission of Mr. Allen's evidence on the grounds that it was not proper opinion evidence. Since, as I will shortly explain, I do not think Mr. Allen's evidence, which is largely argument, helps the Timminco Defendants or harms Mr. Sharma, I am not going to rule on his objection, and I will simply address Mr. Allen's evidence on its merits.

[26] As I understand Mr. Allen's evidence or argument, it is as follows. The Allen Committee was of the view that introducing a statutory misrepresentation claim would be desirable to regulate the secondary market in securities in Canada. However, observing problems in the United States about such claims, the Committee was concerned about exposing corporations and their directors and officers to speculative and extortionate class actions known as "strike suits," and this concern weighed against recommending that a statutory claim be introduced in Canada. A strike suit is a class proceeding where the merits of the claim are not apparent but the nature of the claim and targeted transaction is such that a sizeable settlement can be achieved with some degree of probability because the defendant is confronted with the unpalatable choice of a very expensive court battle or the payment of significant settlements irrespective of the underlying merits of the lawsuit: *Epstein v. First Marathon Inc.*, [2000] O.J. No. 452 (S.C.J.). However, notwithstanding its concerns about strike suits, the Allen Committee decided to recommend the introduction of a statutory claim because the Canadian litigation environment was different than in the United States, in part, because in Canada, discovery comes after the close of pleadings, and thus, unlike the United States, Canada does not have liberal discovery rules that would facilitate strike suits.

[27] Mr. Allen acknowledged that his committee did not, in particular, consider the timing of the disclosure of insurance policies. However, it was his opinion that a requirement that insurance policies and policy limits be disclosed before the leave motion and the close of pleadings might motivate the prosecution of actions based on insurance proceeds and not the merits and this would encourage strike suits and be inconsistent with the policy underpinning the statutory misrepresentation claim.

[28] With respect, I do not see how the disclosure of insurance policies encourages strike suits, nor do I see how disclosure of insurance would have any adverse impact on the statutory regime.

[29] In *Ainslie v. C.V. Technolgies Inc.*, (2008), 93 O.R. (3d) 200 at paras. 10-15, Justice Lax reviewed the legislative history to Part XXIII.1 of the Act, including the Allen Committee Report, and she concluded that the purpose of the leave motion (which was not suggested by the Allen Committee) was to prevent strike suits.

[30] The statutory leave test under s. 138.8 of the Act, which Justice Van Rensburg discusses in considerable depth in *Silver v. Imax Corp*, [2009] O.J. No. 5573 (S.C.J.), provides that the court shall grant leave only where it is satisfied that (a) the action is brought in good faith, and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff. Thus the test for leave probes the merits of the proposed action.

[31] The presence or absence of insurance, however, is usually irrelevant to the merits of a lawsuit. It is precisely because of this irrelevancy that it was necessary to add rules 30.02 (3) and 31.06 (4) to the Rules of Civil Procedure to provide for the disclosure of insurance policies. The disclosure of insurance policies will not assist Mr. Sharma in obtaining leave to prosecute an action under Part XXIII.1 of the Act. All the disclosure of information, might do is encourage him to have informed settlement discussions or dissuade him from even seeking leave because of concerns about whether there was a collectable financial recovery.

[32] In *Ainslie v. C.V. Technolgies Inc.*, *supra,* Justice Lax stated that the essence of the leave motion was that the putative plaintiff was required to demonstrate the propriety of his or her claim before the defendant was required to respond. I agree with Justice Lax, but I note that the disclosure of the insurance policies will not assist Mr. Sharma in obtaining leave because the presence or absence of insurance is irrelevant to the propriety of his claim.

[33] In *Ainslie v. C.V. Technolgies Inc.,* Justice Lax stated that there is no onus on the proposed defendants to assist the plaintiff in securing evidence upon which to base an action under Part XXIII.1. Again I agree, but I point out again that the disclosure of insurance does not provide evidence upon which to base an action under Part XXIII.1 of the Act.

[34] In *Silver v. IMAX Corporation*, *supra,* Justice Van Resburg confirmed that there is no discovery of the defendant before the leave motion. I agree, but the purpose of precluding discovery before the leave motion is to preclude the putative plaintiff from "fishing for facts" that would support what was a speculative lawsuit of the strike suit type. Asking for disclosure of insurance information, however, is not fishing for facts but rather provides information for entirely different purposes.

[35] Once again, with due respect to Mr. Allen's argument, it seems unlikely to me that a litigant would be encouraged to advance a baseless lawsuit for which leave is required because he or she might obtain early disclosure of the proposed defendant's insurance policies. Contrary to Mr. Allen's argument, in the context of misrepresentation claims, the stimulant is not the possible presence of insurance but the stimulant for the strike suit is the presence of a plaintiff suffering a loss, a scapegoat defendant, and the plaintiff rushing to the courthouse without considering the merits of the claim.

[36] Put shortly, admitting the evidence of the public policy argument, I am not convinced by it, and I conclude that Mr. Sharma's motion should be granted, and

therefore, the Timminco Defendants are ordered to produce the information that should be produced under rules 30.02 (3) and 31.06 (4).

[37] If the parties cannot agree on the matter of costs, they may make submissions in writing beginning with Mr. Sharma within 20 days of the release of these Reasons for Decision followed by the Timminco Defendants' submissions within a further 20 days.

[38] Order accordingly.

Perell, J.

Released: February 3, 2010

CITATION: Sharma v. Timminco, 2010, ONSC 790
COURT FILE NO.: 09-CV-378701CP
Date: February 3, 2010

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Ravinder Kumar Sharma

Plaintiff

- and -

Timminco Limited, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Dr. Heinz Schimmerlbusch, Robert Dietrich, René Boisvert, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich and John P. Walsh

Defendants

REASONS FOR DECISION

Perell, J.

Released: February 3, 2010

Tab 20

Indexed as:

Seaway Trust Co. v. Markle

Between
Seaway Trust Company, Seaway Mortgage Corporation, Seaway Real Property Limited, Greymac Trust Company, Greymac Properties Inc., and Greymac Mortgage Corporation, Plaintiffs, and Andrew Markle, Leonard Rosenberg, William Player, 435713 Ontario Inc., S.T.M. Investments Limited, Kilderkin Investments Limited, Kinsberg Property Investments Limited, Robert Braun, Broadhurst & Ball, David Allport, Camreco Inc., Fogler, Rubinoff and Phillip Meretsky, Defendants

[1992] O.J. No. 1602

11 C.P.C. (3d) 62

[1992] I.L.R. 2044

[1992] I.L.R. para. 1-2885 at 2044

34 A.C.W.S. (3d) 1072

Action No. 8635/83Q

Ontario Court of Justice - General Division
Toronto, Ontario

D. Lane J.

Heard: July 13, 15, 1992
Judgment: July 30, 1992

(6 pp.)

Insurance -- Practice -- Discovery of insurance position.

Motion for answers on discovery. At issue was the extent to which an insured party must give to

opposite parties information as to its insurance situation.

HELD: The questions should be answered. The rules had been amended to enable an examining party to learn what amount was actually likely to be available under a policy and under what conditions.

STATUTES, REGULATIONS AND RULES CITED:

Ontario Rules of Civil Procedure, Rules 30.02(3), 31.06(4) (a), 31.06(4)(b).

Daniel V. MacDonald, for the Plaintiffs.
Sheldon Salcman, for the Defendant, Kinsberg.
H.M. Wise, for the Defendants, Allport and Broadhurst & Ball.
R. Janes, for the Defendant, Fogler, Rubinoff.
John Marshall, for the Defendant, Meretsky.

D. LANE J.:-- This motion raises the issue of the extent to which an insured party must give to opposite parties on discovery information as to its insurance situation.

The defendant Allport is a solicitor who is sued for alleged breaches of fiduciary duty to the plaintiffs and alleged conspiracy with others to defraud the plaintiffs in connection with certain real estate transactions. He and the firm in which he was a partner at the time are the insureds under a policy of insurance. It is conceded that the policy itself is producible under rule 30.02(3) and that its "existence and contents" are a proper subject for questions on examination for discovery under Rule 31.06(4) (a). The issue is the scope of questioning permitted under rule 31.06(4)(b):

> 31.06(4) A party may on an examination for discovery obtain disclosure of,
>
> ...
>
> (b) the amount of money available under the policy and any conditions affecting its availability.

Prior to 1990, the rule provided only that disclosure could be obtained of the existence and contents of the insurance policy. Under that form of the rule, the court had held that questions were not permitted as to the amount actually available under the policy: D'Amore Construction

(Windsor) Ltd. v. Ontario et al. (No. 1) (1986), 12 C.P.C. (2d) 174 (H.C.J.) nor as to the existence of a non-waiver agreement or other understandings between insurer and insured: Guarantee Co. of North America v. Morris, Burk et al. (1985), 50 C.P.C. 122 (Ont. Master), aff'd ibid. at 125 (H.C.J.).

I agree with the submissions of Mr. Salcman, and with the editors of Watson & McGowan: Ontario Civil Practice 1992-93, p. 437 that the purpose of the 1990 amendment adding sub-rule (b) was to reverse this case law. The purpose of the rule is not to enable parties to obtain information as to matters in issue in the suit, for only rarely is a party's insurance in issue and in such cases the policy would have to be produced if this rule did not exist. Rather, it is to enable the opposite party to have information which is necessary to the making of an informed and sensible decision as to whether to proceed with the suit. Although written about the production of the policy itself under Rule 30.02(3), the analysis of Thorson J.A. in Sabatino v. Gunning (1985), 50 O.R. (2d) 171 is to the point:

> In my opinion that purpose, briefly stated, is to assist the making of informed and sensible decisions by parties involved in litigation, in circumstances where the extent, if any, to which recourse can be had by one or more of the parties to any available insurance moneys in the event of their eventual success in the litigation may play a major and even a determinative role in how the litigation is conducted, and through what stages it should be pursued.

It was argued by Mr. Marshall, supported by Mr. Wise, that the phrase: "... any conditions affecting its availability", introduced by the 1990 amendment, was confined to the conditions contained within the policy itself. I do not agree. Those conditions can readily be ascertained by reading the policy or by questions as to the contents of the policy under the rule as it stood prior to the amendment.

I must seek to give each part of the rule some meaning and Mr. Marshall's submission deprives this part of it of any impact. The word "condition" does have a specific meaning in an insurance policy but in ordinary parlance it encompasses a provision, a stipulation, a pre-requisite and a mode or state of being. (O.E.D.)

In my view, the amendment was intended to enable an examining party to learn what amount is actually likely to be available under the policy and under what conditions. The word "conditions" is not, I think, used as narrowly as counsel contended. It is intended to refer to conditions which may have come into existence as the result of non-waiver agreements or other agreements or understandings between insurer and insured, notices given by either to the other or positions taken as to the liability of the insurer under the policy in the circumstances of the case. It is not the intent of the rule to open up the whole file between insurer and insured. It is significant that the rule as to the production of insurance policies was not amended to broaden the scope of production of

insurance-related documents beyond the policy itself. In my view, the examiner is entitled to disclosure in full of the terms of any agreement, understanding, notice or position taken, written or oral, that 'may affect the availability of the insurance proceeds but no more than that. The details of the information made available to the insurer by the insured or obtained by the insurer through its own investigation are not subject to disclosure under this rule even though such information will usually provide the factual basis for the agreement, understanding, notice or position in question. If the Rules Committee had intended a broader disclosure of the insurer's file, the Rules would have explicitly provided for it.

The questions at issue are:

1. Do the firm's insurers admit liability? If they deny, on what basis?
2. How much money is available?
3. What steps have been taken to enforce liability? With what result? What is the present status?
4. On what basis is the insurer not defending this action?

Questions 1 and 4 are aspects of the same issue: what position has the insurer taken with respect to its obligation to indemnify and the companion obligation to defend? Such information is both crucial to the examiner's ability to make a reasoned decision concerning the action and within the language of the subrule as analyzed, supra. These questions should be answered.

Question 3 appears at first glance to be rather intrusive into the relationship of insurer-insured but on analysis, it is seen to be merely an up-dating of the information in the answers to questions 1 and 4. It should be answered.

Question 2 is plainly within the first part of sub-rule (b) and must be answered.

These reasons deal with only one part of a very extensive motion and costs will be dealt with in the larger motion.

D. LANE J.

---- End of Request ----
Email Request: Current Document: 3
Time Of Request: Thursday, March 08, 2012 15:54:29

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No.: CV-12-9667-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at **TORONTO**

BOOK OF AUTHORITIES OF THE AD HOC COMMITTEE OF PURCHASERS OF THE APPLICANT'S SECURITIES, INCLUDING THE REPRESENTATIVE PLAINTIFFS IN THE ONTARIO CLASS ACTION

(Motion Returnable July 30, 2012)

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
250 University Avenue, Suite 501
Toronto, ON M5H 3E5
Ken Rosenberg / Massimo Starnino
Tel: 416- 646-4300 Fax: 416-646-4301

KOSKIE MINSKY LLP
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3
Kirk Baert / Jonathan Bida
Tel: 416-977-8353 Fax: 416-977-3316

SISKINDS LLP
680 Waterloo Street
London, ON N6A 3V8
A. Dimitri Lascaris / Charles M. Wright
Tel: 519-672-2121 Fax: 519-672-6065