2008 CarswellBC 712, 2008 BCSC 446, 41 C.B.R. (5th) 49, [2008] B.C.W.L.D. 3192

2008 CarswellBC 712, 2008 BCSC 446, 41 C.B.R. (5th) 49, [2008] B.C.W.L.D. 3192

Pine Valley Mining Corp., Re

In the Matter of the Companies' Creditors Arrangement Act,R.S.C. 1985, c. C-36, as amended

And In the Matter of the Business Corporations Act, R.S.B.C. 2002, c. 57, as amended

In the Matter of Pine Valley Mining Corporation, Falls Mountain Coal Inc., Pine Valley Coal Inc., and Globaltex Gold Mining Corporation (Petitioners)

British Columbia Supreme Court

N. Garson J.

Heard: April 9, 2008
Judgment: April 14, 2008
Docket: Vancouver S066791

Proceedings: additional reasons to *Pine Valley Mining Corp., Re* (2008), 2008 CarswellBC 579, 2008 BCSC 356 (B.C. S.C.)

Counsel: J.R. Sandrelli, O. Jones for Pine Valley Mining Corporation

B.G. McLean, C. Armstrong for Tercon Mining PV Ltd.

W. Kaplan, Q.C. for Monitor

D.A. Garner for Petro-Canada

J.D. Bergman for CN Rail

Subject: Insolvency; Evidence

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

F Inc. was wholly-owned subsidiary of P Corp. — P Corp. and F Inc. successfully petitioned for general stay of proceedings under Companies' Creditors Arrangement Act ("CCAA") — Petition did not disclose inter-company debt as between petitioners — Inter-company debt was revealed when Monitor appointed by Court in CCAA proceeding requested unconsolidated financial statements for each of petitioners — P Corp. filed claim with Monitor stating that F Inc. was indebted to P Corp. in amount of $42 million — Fourth report issued by Monitor to Court contained detailed view of transactions underlying P Corp. claim — Monitor proposed to allow revised claim against F Inc. in amount of

$27 million — Some creditors objected to claim — Application was brought for directions respecting process for determination of amount of P Corp.'s claim against F Inc. within proceeding under CCAA — Function of Monitor was to determine validity and amount of claim on basis of evidence submitted — Monitor's process in doing so was in no way akin to adversarial process — Monitor was not entitled to deference in sense that would alter burden of proof ordinarily imposed on claimant — P Corp. had burden of proving its claim — Either party was at liberty to use Monitor's report or part of report at trial of matter as expert report provided necessary notice was given to other — Section 12 of CCAA requires summary trial — Section 12 of CCAA informed any decision court must make as to format of trial and that trial must be as section dictated unless to do otherwise would be unjust, or there was some other compelling reason against summary trial — Claim could be tried summarily on reserved date — Parties made additional submissions regarding admissibility of monitor's report — Report entered as evidence, but conclusions were not admissible as expert opinion — Monitor was court officer and neutrality should not be compromised.

Cases considered by *N. Garson J.*:

Bell Canada International Inc., Re (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List]) — considered

Canadian Airlines Corp., Re (2001), [2001] 7 W.W.R. 383, 14 B.L.R. (3d) 258, 92 Alta. L.R. (3d) 140, 2001 ABQB 146, 2001 CarswellAlta 240, 294 A.R. 253 (Alta. Q.B.) — distinguished

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

ADDITIONAL REASONS to judgment reported at *Pine Valley Mining Corp., Re* (2008), 2008 CarswellBC 579, 2008 BCSC 356, 41 C.B.R. (5th) 43 (B.C. S.C.), regarding admissibility of monitor's report in bankruptcy proceedings.

***N. Garson J.*:**

1 These supplementary Reasons for Judgment concern the admissibility of a court appointed monitor's report, and the compellability of a monitor as an expert witness, at the summary trial of a contested application in this proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended ("CCAA").

2 I issued Reasons for Judgment on March 14, 2008 (2008 BCSC 356 (B.C. S.C.)) concerning the procedure that would govern the summary trial of the claim of Pine Valley Mining Corporation ("PVM") against Falls Mountain Coal Inc. ("FMC"). Following delivery of those Reasons for Judgment, the Monitor applied for leave to make further submissions with respect to para. 15 of the Judgment. No party opposed the application to re-open the hearing. The order emanating from the Reasons for Judgment not having been entered, I granted leave to all parties to make further submissions concerning the admissibility of the Monitor's Report and the compellability of the Monitor at the summary trial.

3 This dispute concerns a claim, by PVM against its previously wholly-owned-subsidiary FMC, for approximately $42 million. The dispute centers on the question of whether payments made by PVM to FMC were in whole, or in part, loans or investments. If the latter, then PVM would rank after the general creditors in the CCAA proceeding. The facts which form the background to this inter-company claim are set out in my Reasons for Judgment at 2008 BCSC 356 (B.C. S.C.).

4 At para. 15 of those Reasons for Judgment I stated:

> The Monitor has spent a good deal of time investigating the PVM claim. His report documents the numerous transactions that are at issue, and provides a very useful framework for the court. There is much in the report that may be of use to the parties at the hearing of this matter. In exercising my jurisdiction to give directions for a summary determination of this matter I order that either party is at liberty to use the Monitor's report or part of the report at the trial of this matter, as an expert report, provided the necessary notice is given to the other. The Monitor may be required to be cross-examined on the report.

5 At the subsequent hearing the parties made further submissions concerning the use to which the Monitor's Report could be put at the trial of the inter-company claim and whether the Monitor's conclusion as to the characterization of the payments made by PVM to FMC could be used as an expert opinion at the trial.

6 I am now satisfied that, for the most part, the parties have been able, with the assistance of the Monitor, to satisfy themselves as to the proper accounting of the inter-company claim. The remaining issue between the parties is whether the amounts so paid are properly characterized as debt or equity. No party is opposed to the admissibility, at the summary trial, of those portions of the Monitor's Report which detail the numerous transactions between PVM and FMC. What is now at issue is the question as to whether the Monitor's conclusions, that about $27 million dollars of the payments is properly characterized as debt owed to PVM and not as an equity investment by PVM in FMC, is admissible evidence at the summary trial and if so whether and under what terms the Monitor is compellable as a witness. In my earlier Reasons for Judgment, I did not differentiate between what I shall for convenience call the accounting portions of the Monitor's Report and his conclusions or opinion on the proper characterization of the payments.

7 Mr. Sandrelli, for PVM, wishes to rely on the Monitor's conclusions as contained in his Report. Mr. McLean, for Tercon on behalf of the general creditors, contends that if I permit PVM to use the entirety of the Monitor's Report as evidence, PVM will be obtaining "a leg up", and, in effect, reversing the burden of proof, notwithstanding that in my earlier Reasons for Judgment, I held that PVM carried the burden of proving its whole claim regardless of the Monitor's conclusions.

8 Mr. Kaplan, counsel for the Monitor, suggested the following directions, which he says take into account the special role of the Monitor as an impartial officer of the Court:

> 1. Either party may file with the Court the Monitor's 4th Report concerning the inter-company claim ("Monitor's Report") or the Notice of Revision concerning the PVM inter-company claim ("Notice of Revision"), at the hearing concerning the inter-company claim presently scheduled to commence May 28, 2008 (the "Hearing").
>
> 2. The Monitor's Report may be received into evidence at the Hearing as evidence of the following matters:
>
> (a) that the transactions referenced therein occurred on or about the date referenced in the Monitor's Report, and in the amounts referenced in the Monitor's Reports;
>
> (b) that the summaries of the Petitioners' accounting of dollar values of transactions over a given time period referenced in the Monitor's Report are accurate summaries of the dollar values of such transactions over such period of time as referenced in the Monitor's Report;
>
> (c) the Monitor's conclusions concerning whether a particular transaction was in the nature of a debt transaction or equity transaction can be received into evidence by the Court but such conclusions are not binding upon the Court; and

(d) that the Monitor's conclusion that a particular payment or receipt was a payment or receipt on behalf of either PVM or FMC, as the case may be, may be received into evidence at the hearing but that such conclusion is not binding upon the Court.

3. On or before_____, 2008, either party may deliver questions or inquiries to the Monitor in respect to the Monitor's Report, including, without limiting the foregoing, questions or inquiries concerning the following matters:

(a) details of the Monitor's accounting of the various transactions, including details of the Monitor's tracing of transactions through any bank accounts or accounting records of the Petitioners;

(b) documents relied upon by the Monitor in respect to the accounting of a particular transaction or transactions;

(c) the content of management input in respect to the accounting of any transaction or transactions; and

(d) details concerning the information or document requested from the companies by the Monitor in respect to any transaction, whether or not such information or documentation was provided to the Monitor and, if not, why not.

4. The Monitor shall deliver a supplementary report (the "Monitor's Supplementary Report") responsive to the questions posed to the Monitor by the parties within 10 days of receipt of the questions and circulate the Monitor's Supplementary Report to the parties and the Court. In the event the Monitor is unable to respond to a question the Monitor shall provide the reasons for such inability in the Monitor's Supplementary Report.

5. Any party is at liberty to deliver follow-up questions to the Monitor upon receipt of the Monitor's Supplementary Report and the Monitor shall make every effort to respond to such follow-up questions at the earliest reasonable time.

6. Either party may file the Monitor's Supplementary Report at the Hearing and the Monitor's Supplementary Report may be received into evidence at the Hearing on the same terms and conditions as described in paragraph 2 herein in respect of the Monitor's Report.

7. Either party may apply to the Court for further directions concerning examination of the Monitor at the hearing on the Monitor's Report or the Monitor's Supplementary Report.

8. The Monitor may be subject to examination at the Hearing of this matter, by the Court, at the Court's discretion or on the application of either party, in respect to any matter contained in the Monitor's Report or the supplementary Monitor's Report.

9 In *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List]), Mr. Justice Farley discussed the question of the admissibility of a monitor's report, and the role of the monitor. He stated, at paras. 6, 7 and 8:

6 L disputes that the Monitor's report is evidence but gives no basis for such a submission. With respect, I disagree. I do not think it necessary to delve deeply into this question but I do think it suffice to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding. For instance, see John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown &

Company, Toronto & Boston; 1974) at pp. 791-6, Volume 5 (section 1670) discusses the ancient origins of reports being received as admissible evidence, stating at p. 791:

> A report is to be distinguished from a return, as already defined (s. 1664 supra,) in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement — "inquisition" or "inquest" — suggest more clearly its special quality, namely that of resting upon means of information other than original personal observation.
>
> Now an inquisition or report, if made under due authority, stands upon no less favourable a footing than other official statements. As a statement made under official authority, or duty, it is admissible under the general principle (sc 1633, 1635 supra).

7 Sir Gavin Lightman and Gabriel Moss, *The Law of Receivers and Administrators of Companies* (3rd ed., 2000; Sweet & Maxwell, London) at p. 115 distinguishes between the capacity and quality of "officer-holder" and "officer of the court."

> Officers of the court [such as court appointed receivers (Chap. 22), administrator (Chap. 23), provisional liquidators and liquidators in a compulsory liquidation (Chap. 2)] are appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex p. James [(1874) 9 Ch. App. 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably.

8 L submitted that the Monitor, as an officer of the court, cannot be cross examined (citing *Re Bakemates International Inc.*, [2002] O.J. No. 3569 (C.A.) at paras. 31-32; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at para. 5; *Re Anvil Range Mining Corp.*, [2001] O.J. No. 1125 (Ont. S.C.J. [Comm. List]) at paras. 3-4). With respect, that is an oversimplification or an overstatement as is clearly seen by my observations at paras. 3-4 of *Anvil* including the cite from *Innisfil*:

> (3) The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.
>
> (4) See *Mortgage Insurance Co. v. Innisfil Landfill Corp.* (1985), 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 103-2 where I stated:
>
> > As to the question, of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter"(at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is truly needed.

The jurisprudence which I referred to included *Re Mr. Greenjeans Corp.* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.J.) and *Avery v. Avery*, [1954] O.J. No. 67, (H.C.J.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. QB) at p. 30. See also paper *"Canadian Airlines — The Last Tango in Calgary"* by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.* (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

10 In *Rescue! Companies' Creditors Arrangement Act*, (Toronto: Carswell, 2007) Janis P. Sarra, wrote at p. 269:

7. Monitor's Reports and the Issue of Compellability

As an officer of the court, the monitor has been found not to be compellable to give evidence in a proceeding, although the monitor reports to the court on a regular basis. The monitor's reports have been found to be "not evidence" and hence not generally subject to cross-examination; rather, as an officer of the court, the monitor is to act "lawfully, fairly and honourably". In Ontario, the court has held that insolvency officers will not generally be subject to cross-examination of their reports, while acknowledging that these court-appointed officers do occasionally make themselves available for examination in the spirit of co-operation and common sense.

The Ontario Supreme Court of Justice in *Bell Canada International Inc.* held that although the situation did not warrant it in the instant case, an officer of the court may be cross-examined on a report in exceptional or unusual circumstances. Such circumstances could include situations where the monitor refused to co-operate in clarifying a part of its report or in not expanding on any element in the report as may be reasonably requested. The Court held that the reasonability of a request must take into account the objectivity and neutrality of the officer of the court; specifying that: "woe betide any officer of the court who did not observe his duty to be neutral and objective". This judgment indicates that one of the monitor's duties is to clarify information to stakeholders based on a reasonableness test. Failing this, the court may in exceptional circumstances compel the monitor to be examined. It also indicates that the court's deference will depend on the monitor complying with its duty to be impartial, objective and fulsome in its report.

The monitor's report offers an opinion to the court as to the accuracy of the information or the wisdom of particular proposed actions. This is not problematic if the monitor is not acting as an advocate for the debtor corporation. However, where it is, it is unclear that the courts have yet generally recognized that this may be problematic for creditors and other stakeholders seeking to challenge the monitor's conclusions. This has implications for interim decisions during the course of *CCAA* proceedings, such as a sale of assets during the proceeding and the court's reliance on the monitor for its business judgment. Rarely has the court preferred the evidence of creditors or disregarded the opinion of the monitor.

In the *Canadian Airlines* proceeding, the noteholders sought to cross-examine the monitor on its liquidation analysis. It was the first time that such an issue had come before the court. Madam Justice Paperny of the Alberta Court of Queen's Bench concluded that cross-examination might not be necessary if the monitor provided further information. It directed the noteholders and dissenting shareholders to send written questions to the monitor, finding that if the need arose, the court would put questions to the monitor in the courtroom. The monitor subsequently answered almost 70 questions in two Special Reports and the issue became moot.

The Court's approach in *Canadian Airlines* reflected the public interest in full disclosure of the monitor's reasoning while protecting the monitor as an officer of the court. Monitors would generally be far less effective if they were at risk of being compelled to be cross-examined on each of their reports or opinions to the court.

However, the courts have cautioned that monitors' reports should not include information that really should be led as evidence by the debtor corporation in a *CCAA* proceeding. The use of the monitor's report to insulate the debtor from cross-examination may have implications for the dispute resolution process under the *CCAA* as the debtor may have a tactical advantage in the bargaining process where the monitor acts as advocate.

The Ontario Superior Court of Justice in *Bell Canada International* commented on this risk of the debtor shirking its disclosure obligations through the use of the monitor's report. It observed that there have been problems with motions supported by nothing other that [*sic*] the monitor's report. The Court held that if a matter is reasonably expected to be contentious or turns contentious, it is important to have an affidavit from the moving party and time to allow cross-examination. This represents recognition by the court that the monitor may risk its impartiality or the perception of impartiality if its reporting role is used inappropriately to insulate parties from cross-examination.

11 Kevin P. McElcheran in *Commercial Insolvency in Canada* (Markham: Lexis Nexis 2005) states on p. 236:

The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

12 From these authorities and commentaries, I conclude that my discretion should be guided by the following principles:

1. Presumptively a monitor's report, such as the one here, is admissible in evidence at a hearing concerning the subject matter of the report.

2. In unusual circumstances an officer of the court, such as a monitor, may be cross-examined on his report.

3. The monitor must remain neutral as between the various stakeholders in a *CCAA* proceeding.

4. The court should strive to protect the monitor from close involvement in the adversarial process between the claimants.

13 In my previous Reasons for Judgment, I ordered that the Monitor's Report be admissible primarily in order that the Monitor's accounting work be before the Court, and so that the parties not be put to the time consuming and expensive process of duplicating the Monitor's work. Now that the parties have reached almost complete agreement as to the accounting, the question remains as to whether those portions of the Report containing the Monitor's conclusions should also be available to PVM as expert or opinion evidence.

14 It is open to either party to obtain an outside opinion, on the character of these payments, such opinion being based on the extensive accounting and investigation already done by the Monitor. Because the Monitor has done the "heavy lifting" so to speak, I do not think it would be particularly burdensome for either party, if they choose to do so, to obtain expert opinions on the characterization of the payments.

15 Nothing in these Reasons for Judgment should be taken as determining whether such an opinion would be considered an opinion on a question of law or mixed fact and law or is one on which the Court requires expert evidence. I would not wish these Reasons to be considered as in any way tying the hands of the trial judge to rule on the question of the admissibility of such a report. However it is necessary for me to rule on the question of the use that may be made of the Monitor's Report now, so as to enable the parties to adequately prepare for the summary trial.

16 Would the neutral role of the Monitor be compromised by permitting PVM to use his conclusions as expert opinion evidence?

17 I have concluded that the Monitor's 4th Report (and any supplementary reports concerning the inter-company accounting) is admissible for purposes of the trial, but his conclusion as to the characterization of the payments as debt or equity are not admissible as an expert opinion. In reaching this conclusion I have considered the fact that the Monitor is an officer of the Court. He is the eyes and ears of the Court. His role is to assist the Court. To permit either party to use his conclusions on the very question the Court must decide as opinion evidence offends the principle that he must remain entirely neutral as between competing claims of the various stakeholders. The Monitor must be insulated from the adversarial nature of the contested claim; he should not be fearful that, as a result of stating his opinions, he will become embroiled in the litigation in an adversarial way. I have already decided that the summary trial is a trial *de novo*. It is not an "appeal" from the Monitor's findings. I have already decided that PVM carries the burden of proving its whole claim. In this case, it is convenient, and perhaps necessary, to use the accounting portion of the Monitor's Report, for a fair and summary adjudication of the inter-company claim, but the same argument for convenience cannot be made out for the Monitor's characterization of the payments; and, in any event, to admit the Monitor's conclusions on that issue would be to expose the Monitor unnecessarily to the adversarial process. This issue differs from one in which the Court relies on the business judgment of the Monitor such as the approval of the sale of assets or a liquidation analysis as in the *Canadian Airlines Corp., Re*, 2001 ABQB 146 (Alta. Q.B.) case.

18 In the exceptional circumstances of this case, and particularly given that most of the accounting is no longer at issue, I remain of the view that those portions of the Monitor's Report in which he had painstakingly reviewed the accounts of the company are of great assistance to the parties and the Court and ought to be admissible. As to those findings, the directions suggested by the Monitor apply if the parties are unable, on an informal basis, to obtain any additional information that they need from the Monitor. However, paras. 2(c) and (d) as proposed by the Monitor will be removed from the directions. The parties should set a date for inclusion in para. 3 of the directions.

19 If further applications for pre-trial directions are necessary, they should be made to the trial judge assigned to this matter.

Order accordingly.

END OF DOCUMENT

2010 CarswellAlta 57, 2010 ABCA 16, 18 Alta. L.R. (5th) 201, 469 A.R. 333, 470 W.A.C. 333, 63 C.B.R. (5th) 26

2010 CarswellAlta 57, 2010 ABCA 16, 18 Alta. L.R. (5th) 201, 469 A.R. 333, 470 W.A.C. 333, 63 C.B.R. (5th) 26

Bank of Montreal v. River Rentals Group Ltd.

Bank of Montreal (Not a Party To the Appeal / Plaintiff) and River Rentals Group Ltd., Taves Contractors Ltd. and McTaves Inc. (Respondent / Defendant) and Hutterian Brethren Church of Codesa (Appellant / Other) and Bill McCulloch and Associates Inc. (Respondent / Other) and Don Warkentin (Respondent / Other)

Alberta Court of Appeal

Ronald Berger, Patricia Rowbotham JJ.A., R. Paul Belzil J. (ad hoc)

Heard: January 7, 2010
Judgment: January 18, 2010
Docket: Edmonton Appeal 0903-0191-AC, 0903-0236-AC

Counsel: D.R. Bieganek for Respondent, River Rentals Group, Taves Contractors Ltd., McTaves Inc., Bill McCulloch and Associates Inc.

G.D. Chrenek for Appellant, Hutterian Brethren Church of Codesa

T.M. Warner for Respondent, Don Warkentin

Subject: Corporate and Commercial; Insolvency

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver

Court-appointed receiver of group of companies called for offers to purchase property — Tender closing date was May 7 — H offered $2,205,000 — W tendered offer of $2,100,000 on understanding that he would receive possession of property in fall — On May 21, W learned that he would get possession of property earlier and increased bid to $2,300,000 — Receiver brought application to approve sale of property to H — Chambers judge granted order extending deadline to submit revised offers to purchase property, with submissions restricted to H and W — During extension period, W submitted highest bid — Chambers judge granted order directing that property be sold to W — H appealed — Appeal allowed — Chambers judge erred in principle and on insufficient evidence ordered that property be subject of extended re-tendering process — Chambers judge made no finding that price in H's offer was so unreasonably low as to demonstrate that receiver was improvident in accepting it — Chambers judge did not consider interests of H as highest bidder nor interests of others who made compliant bids — There was no cogent evidence before chambers judge of any unfairness to W — Chambers judge's order conferred advantage upon W who then knew price that had previously been offered by H.

Cases considered:

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303, 1981 CarswellNS 47 (N.S. C.A.) — followed

Royal Bank v. Fracmaster Ltd. (1999), (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 CarswellAlta 539, 1999 ABCA 178 (Alta. C.A.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 1985 CarswellAlta 332 (Alta. C.A.) — followed

APPEAL by bidder from orders extending deadline to submit revised offers to purchase property and approving sale of property to another bidder.

***Per curiam*:**

1 At the hearing of this appeal, we announced that the appeal is allowed with reasons to follow.

2 Bill McCulloch and Associates Inc. is the court-appointed Interim Receiver and/or Receiver Manager of the corporate Respondents ("the Taves Group") by order dated March 5, 2009. Prior to that date, the Receiver had become Trustee in Bankruptcy of the Taves Group.

3 The Receiver issued an information package and called for offers to purchase the assets of the Taves Group which included a property known as the Birch Hills Lands. The call for offers was dated April 17, 2009. The deadline for submission of offers was on or before May 7, 2009 (the tender closing date).

4 On June 2, 2009, the Receiver brought an application before Wachowich C.J.Q.B. to approve the sale of the Birch Hills Lands to the Appellant. The Appellant's offer was $2,205,000. An appraisal concluded that the most probable sale price was $1,560,000. Counsel for the Receiver explained that "the Receiver did effect wide advertizing in local and national newspapers. Sent out 160 tender packages and made the tender package available on the Receiver's website." (A.B. Record Digest, 3/30-33)

5 Fifteen offers were received on the Birch Hills Lands, six of which were for the entirety of the parcel.

6 In his submission to the Chief Justice, counsel for the Receiver stated:

> Now, what we have advised the party that we're looking to accept is that we can't put them in possession yet until the Court approves the offer. That has caused some angst given the time of year and it is agricultural land, but we're not in a position to put people on the land before we get court approval to do so. So — and that's fine, they're still — they're still at the table so we're good with that.
>
> The offer that the Receiver is recommending acceptance of is — was from the Hutterite Church of Codesa. That offer was for $2,205,000 ... the offer is very significant ... it was an excellent offer.
>
> (A.B. Record Digest, 5/46 -6/19)

7 In considering other tenders with respect to other portions of the property of the Taves Group, the Chief Justice

expressed his views regarding the importance of adhering to the integrity of the tender process:

> You know, we ran a tender process, tender process is meant to be — there are certain rules. It is like, you do not change the rules of baseball or football during the middle of the game. This is the same thing except in this particular case the Court is prepared to exercise the — its inherent jurisdiction to extend the time in Mr. Taves' position. But I — you know, I could be the person who says no, Mr. Taves, you were late, I am sorry. Next time use Fed Ex.(Appeal Record Digest, 12/11-19)

And further:

> We could be coming back right and left. I am inclined, you know, to grant the applications as submitted on these tenders because the tender process was followed properly. That was the market at the time, this is the people that — this is how they bid. You know, circumstances change and when circumstances change, somebody is the beneficiary of it, some — somebody is the loser on this. But the rules were adhered to and having the rules adhered to if, you know — if you want to — if you want to go to the Court of Appeal after the order is entered and say to the Court of Appeal, guess what, oil is now at $90, we want this one resubmitted. And if those five people are wise enough to accept that argument, then good luck to you but — but you know, I am inclined to say we follow a process, the law has to be certain. The law has to be definite. This is what we did and we complied.(Appeal Record Digest, 12/40-13/8)

8 One of the persons who had tendered an offer to purchase the Birch Hills Lands was the Respondent Don Warkentin. Counsel for the guarantor, Mr. Orrin Toews, addressed the Court. He explained that Mr. Warkentin had submitted an offer of $2.1 million "on the understanding that he would be receiving possession of the property sometime in the fall." Counsel further explained that "I believe it was the Receiver while during the initial auction, that it was brought to his attention on May 21st that he would in fact get possession of the property much earlier than he was anticipating. And on that basis he increased his bid by 200,000 which brings his offer to 2.3 million dollars cash." (A.B. Record Digest, 13/27-36) He submitted that Mr. Warkentin's offer be accepted.

9 In response, counsel for the Receiver advised the Court that he had been in written communication with counsel for Mr. Warkentin "and there was no indication in that correspondence that he thought he would get [possession of the lands] in the fall." (Appeal Record Digest, 14/18-20) He added: "I think the tender package is clear that the way it was supposed to close is after the appeal periods on any order has expired. ... So how anybody could reasonably conceive that possession wouldn't be granted until the fall based on that escapes me." (Appeal Record Digest, 14/20-25) He further added: "But the bottom line was at the time tenders closed, Mr. [Warkentin]'s offer was found wanting." (Appeal Record Digest, 14/36-38)

10 On the basis of that information, the Court ruled as follows:

> Well, you know, rather than adjourning it to hear from Mr. Carter, what I am — what I am inclined to do with that piece of property, because of — is — because of an uncertainty as to occupation, dates of occupation or potential lease or whatever it may be, it is too late to put in the crop right now anyway so — ... Retender on this one and make it clear in the tender.
>
> (Appeal Record Digest, 15/7-19)

11 Wachowich, C.J. then granted an order extending the deadline to submit revised offers to purchase the Birch Hills Lands; with submissions restricted to the Appellant and Warkentin. During this extension period, Warkentin submitted a bid higher than the Appellant's. The Appellant did not increase its original offer. Subsequently, on June 17, 2009, Wachowich, C.J. granted an order directing that the Birch Hills Lands be sold to Warkentin. An application by the Appellant to reconsider the June 17, 2009 order was dismissed. The Court also granted a stay order for parts of

the June 2 order and the entirety of its June 17 order, pending the determination of the appeal of the June 2 order. The Appellant appealed the June 2 order on July 22, 2009; and appealed the June 17 order on August 13, 2009 (the appeals were consolidated on August 20, 2009).

12 On applications by a Receiver for approval of a sale, the Court should consider whether the Receiver has acted properly. Specifically, the Court should consider the following:

(a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

Royal Bank v. Soundair Corp. (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16

13 The Court should consider the following factors to determine if the Receiver has acted improvidently or failed to get the best price:

(a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;

(b) whether the circumstances indicate that insufficient time was allowed for the making of bids;

(c) whether inadequate notice of sale by bid was given; or

(d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

Cameron v. Bank of Nova Scotia (1981), 45 N.S.R. (2d) 303 (N.S. C.A.)

Salima Investments Ltd. v. Bank of Montreal (1985), 65 A.R. 372 (Alta. C.A.) at para. 12.

14 The central issue in this appeal is whether the chambers judge, mindful of the record before him, should have permitted rebidding and whether he should have thereafter entertained and accepted the higher offer of $2.51 million plus GST tendered by Mr. Warkentin during the extension period.

15 The relevance of higher offers after the close of process was considered by the Ontario Court of Appeal in *Royal Bank v. Soundair Corp.*, *supra*. Upon review of the jurisprudence, the Court stated at para. 30:

> What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. ...

16 The chambers judge made no such finding. Indeed, he made no assessment whatever of the conduct of the Receiver. The only evidence before the Court at the June 2, 2009 application was the Receiver's fifth report and the affidavit of Orrin Toews who proffered no evidence that the Receiver acted improvidently in accepting the offer of the Appellant.

17 Moreover, the June 2, 2009 order neither considers the interests of the Appellant as the highest bidder nor the interests of others who made compliant, but unsuccessful, bids to purchase the Birch Hills Lands pursuant to the call for offers.

18 This Court has consistently favoured an approach that preserves the integrity of the process. See *Salima Investments Ltd.*, *supra*, and *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.).

19 That was also the view of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of Nova Scotia*, *supra*, at para. 35:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and a higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard - this would be an intolerable situation. ...

20 In addition, there was no cogent evidence before the chambers judge of any unfairness to Warkentin. On the contrary, the impugned order of June 2 conferred an advantage upon Warkentin who then knew the price that had previously been offered by the Appellant when re-tendering his offer.

21 In cases involving the Court's consideration of the approval of the sale of assets by a court-appointed Receiver, decisions made by a chambers judge involve a measure of discretion and "are owed considerable deference". The Court will interfere only if it concludes that the chambers judge acted unreasonably, erred in principle, or made a manifest error.

22 In our opinion, the chambers judge erred in principle and on insufficient evidence ordered that the property in question be the subject of an extended re-tendering process. The appeal is allowed. An order will go setting aside paras. 26 through 32 of the June 2, 2009 and the June 17, 2009 orders, and approving the tender of the Appellant on the terms and conditions upon which the Receiver originally sought approval.

Appeal allowed.

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2007 CarswellAlta 489, 2007 ABQB 249, [2007] A.W.L.D. 2012, 32 C.B.R. (5th) 74

2007 CarswellAlta 489, 2007 ABQB 249, [2007] A.W.L.D. 2012, 32 C.B.R. (5th) 74

Big Sky Living Inc., Re

In the Matter of The Insolvency of Big Sky Living Inc.

Alberta Court of Queen's Bench

D. Lee J.

Heard: April 10, 2007
Judgment: April 16, 2007
Docket: Edmonton BK03-97916

Counsel: Roger C. Stephen for Applicants, Peter Leduc, Norman Seguin

J.H. Hockin for KPMG Receiver of Big Sky Living Inc., HSBC Bank Canada

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Debtors and creditors --- Receivers — Actions by and against receiver — Practice and procedure — General principles

Cross-examination — PL and NS applied for order requiring receiver to attend for cross-examination on its filed report — Application adjourned pending further submissions — Applicants failed to provide affidavit in support, and in oral submissions failed to give particulars as to questionable conduct receiver was allegedly involved in — Cross-examination of receiver, who is officer of court, is exceptional circumstance, and receivers should not be subject to harassment for doing their job, particularly if parties against whom receivership is ordered against are using examination as fishing expedition, or are allowed to establish basis of potential lawsuits against receiver at cost of petitioning party who instituted receivership — Applicants were given time-limited opportunity to put in writing particulars of wrongdoing alleged in receivership, or alternatively, applicants could provide court with specific questions for receiver which could be answered by way of written interrogatories or through cross-examination.

Cases considered by *D. Lee J.*:

Big Sky Living Inc., Re (2007), 2007 ABQB 20, 2007 CarswellAlta 25, 28 C.B.R. (5th) 1 (Alta. Q.B.) — referred to

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 ABQB 423, 2004 CarswellAlta 810 (Alta. Q.B.) — referred to

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners &

Youth Society (2004), 2004 CarswellAlta 557, 2004 ABQB 337 (Alta. Q.B.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — considered

Ravelston Corp., Re (2007), 29 C.B.R. (5th) 45, 2007 CarswellOnt 1115, 2007 ONCA 135 (Ont. C.A.) — considered

APPLICATION for order requiring receiver to attend for cross-examination on its report.

D. Lee J.:

1 The Applicants Peter Leduc and Norman Seguin seek an order requiring Tim Reid of KMPG Inc. to attend at the law offices of their solicitor Roger C. Stephens to be cross-examined on the the report of the Receiver dated and filed January 12, 2007. I originally dealt with this matter on January 9, 2007 when Mr. Leduc and Mr. Seguin applied for the following relief:

> 1. An Order suspending the sale of the unsold lands which remain the subject matter of this Receivership, namely, twenty-three lots (the "Lands") to Ashton Homes Ltd. ("Ashton") pending further Order of this Court;
>
> 2. An Order requiring the Receiver to provide an accounting and report to this Court respecting all sales of the lands governed by this receivership and the parties' performance under the purchase and sale agreement between the Receiver and Ashton;
>
> 3. An Order requiring the Receiver of Big Sky Living Inc., KPMG Inc., to obtain an appraisal of the Lands;
>
> 4. An Order requiring the Lands to be listed and sold on the open market to the highest bidder.

2 I declined to granted any of the relief sought in the January 9, 2007 motion, and any attempt to cross-examine the Receiver would have to await his Report. This is discussed in my written Reasons dated January 11, 2007, now reported at 2007 ABQB 20 (Alta. Q.B.).

3 Following the issuance of the Receiver's latest report, the Applicants Mr. Leduc and Mr. Seguin through their counsel Mr. Stephens submitted that the report "raises many questions with respecting the conduct of the receivership, and in particular the continued sale of lands at prices established in 2001, despite the protests of the Applicants". No Affidavit in support of this motion to cross-examine the Receiver is made either by Mr. Leduc or Mr. Seguin. The Receiver's latest report dated January 12, 2007 is quite extensive. In oral submissions Mr. Stephens is not able to give the Court many, if any, particulars as to the questionable conduct that he says the receiver is involved in.

4 Cross-examination of a Receiver, who is an officer of the Court, is an exceptional circumstance, and Receivers should not be subject to harassment for doing their job, particularly given that most Receivers in doing their jobs usually offend the parties against who the receivership is ordered. This is particularly so if the parties against whom the receivership is ordered against are using the examination of the Receiver as a fishing expedition, or to allow them to establish the basis of potential lawsuits against the Receiver, at the cost of the petitioning party in this case the HongKong Bank who instituted the receivership.

5 The law in this area was described in my written Reasons for Judgment in *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, 2004 ABQB 337 (Alta. Q.B.) and 2004 ABQB 423 (Alta. Q.B.). More recent cases from the Ontario Courts have confirmed the circumstances in which

an examination of a Receiver is appropriate.

6 In *Ravelston Corp., Re*, 2007 CarswellOnt 661 (Ont. S.C.J. [Commercial List]) Cumming, J. of the Ontario Superior Court of Justice (Commerical List) stated the following criteria at paragraphs 37 and 38: —

> 37 The Receiver had declined to volunteer for an out-of-court examination. A court-appointed receiver is not generally subject to cross-examination on the contents of its reports. There are exceptional situations. See for example *Confectionately Yours, Inc., Re* (2001), 25 C.B.R. (4th) 24 at para. 2 (Ont. Super. Ct.), var'd on other grounds, (2002), 219 D.L.R. (4th) 72 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2002] S.C.C.A. No. 460; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corporation* (1995), 30 C.B.R. (3d) 100 at para. 5 (Ont. Gen. Div.); *Re. Anvil Range Mining Corp.* (2001), 21 C.B.R. (4th) 194 at para. 4 (Ont. Super Ct.); *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 506 at para. 18 (Q.B.); and *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 710 at paras. 17-22 (Q.B.)
>
> 38 In *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 at para 8 (Super. Ct.), Farley J. of this Court stated:
>
> > [A] court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.* (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates [Re Confectionately Yours]* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

7 The Ontario Court of Appeal in 2007 ONCA 135 (Ont. C.A.) concluded that there was not reason to interfere with the motion Judge's decision in *Ravelston Corp., Re*.

Conclusion

8 As matters presently stand, Mr. Stephens has not been able to show the Court any cogent or compelling reason why the Receiver should be subject to a cross-examination. However, I am prepared to give Mr. Stephens a further opportunity to put in writing the particulars of the wrongdoing that he is alleging in this Receivership. I am also prepared to give Mr. Stephens the opportunity, in the alternative, to provide the Court with specific questions for the Receiver, which the Receiver could answer by way of written interrogatories or through cross-examination.

9 This list of questions however must have a demonstrably valid basis and purpose, in accordance with the principles described above.

10 Any cross-examination of the Receiver, or any questions that I direct the Receiver to answer, will also have to be dealt with in a procedurally fair manner, and the costs involved in having the Receiver answer these questions or be cross-examined, has to be dealt with.

11 Mr. Stephens will have until April 24, 2007 to produce particulars as to the improprieties he believes exists in this Receivership, as well as to provide a list of questions, and the reasons the questions need to be asked and answered.

Mr. Hockin will have until May 8, 2007 to respond to the arguments put forward by Mr. Stephens, to advise which questions, if any, are acceptable, and the objection that he has to the Receiver answering the remainder of the questions proposed.

Order accordingly.

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1995 CarswellOnt 43, 30 C.B.R. (3d) 100, 3 O.T.C. 23

1995 CarswellOnt 43, 30 C.B.R. (3d) 100, 3 O.T.C. 23

Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.

MORTGAGE INSURANCE COMPANY OF CANADA v. INNISFIL LANDFILL CORPORATION

Ontario Court of Justice (General Division — Commercial List)

Farley J.

Heard: November 16, 1994
Judgment: January 12, 1995
Docket: Docs. 52941/90, B38/92

Counsel: *J.L. McDougall, Q.C.*, and *N.J. Emblem*, for Price Waterhouse Limited, receiver and manager of Innisfil Landfill Corporation.

R. Lindgren, for Hodgsons.

Linda McCaffrey, Q.C., for Attorney General.

M. Green, for County of Simcoe.

C. Findlay, for Town of Innisfil.

K. Thomson, for Mortgage Insurance Company of Canada.

J. Coop, for Ministry of Environment and Energy.

Subject: Corporate and Commercial; Insolvency

Receivers --- Conduct and liability of receiver — Duties.

Receivers — Powers — Court-appointed receiver entitled to give report and not required to swear affidavit.

A court-appointed receiver-manager, as an officer of the court, is not required to provide a sworn affidavit with its report. Only in unusual circumstances will other parties be allowed to examine the receiver-manager on any report.

Statutes considered:

Environmental Protection Act, R.S.O. 1990, c. E.19.

1995 CarswellOnt 43, 30 C.B.R. (3d) 100, 3 O.T.C. 23

Ontario Water Resources Act, R.S.O. 1990, c. O.40 —

s. 53

Planning Act, R.S.O. 1990, c. P.13.

Motion by receiver-manager for directions and advice; Cross-motion by Attorney General to quash report.

***Farley J.*:**

Endorsement on Cross-motion and Motion

Endorsement on Cross-motion by Ministry of the Attorney General

1 Ms. McCaffrey says that she does not know the nature of the relief being sought — and that, in failing to specify, the Receiver has breached the Rules and the Practice Direction. Over and above that she complains that there is no sworn affidavit from the Receiver.

2 Mr. Thomson, for Mortgage Insurance Company of Canada, ("MICC"), characterized the relief sought as being as plain as the nose on one's face. I agree — but then perhaps the difficulty with that metaphor is that it requires one to take a look in the mirror. The objecting parties would have a difficult time in attempting to peer into the looking glass when they are doing an imitation of an ostrich. Alice in Wonderland in comparison looks like a normal regime.

3 The question in issue was put squarely and fairly in Mr. McDougall's letter of September 23, 1994 to Ms. McCaffrey, a copy of which other counsel have in the Compendium relating to Price Waterhouse Limited's ("PWL") obligations as Receiver and Manager ("R/M") relating to the forcemain and pumping station required by the Director's (Wilfred Ng) letter of September 16, 1994 in light of PWL's lack of funds in this receivership and what the Ministry of Environment and Energy's ("MOEE") position was towards that problem.

4 As to the Practice Direction, I am puzzled by counsel's reluctance to sign the Request Form since the time was cleared for what they understood would be a directions question. I am afraid that the litigation system would be badly served if, as a regular matter, opposing parties had to be served with a complete record before agreeing to dates.

5 As to the question of there not being any affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-)examination when the Receiver is willing to clarify or amplify his material when such is truly needed.

6 Motion by the Ministry of the Attorney General ("AG") to quash is dismissed.

Motion of Receiver ("PWL") for Directions

7 As Mr. McDougall said this morning, he put the R/M's request for advice and directions into as plain English as

he was capable. This is as follows:

> (a) Whether, having in mind the settlement reached on July 26, 1994, it is sufficient for Price Waterhouse Limited, ("PWL"), to install the Leachate Collection System alone before applying to the Court for a discharge and termination of the receivership;
>
> (b) If it is the Court's view that PWL is obliged to install a pumping station and forcemain system, how is such an installation to be financed?

8 I do not think that I had any difficulty in understanding this request for directions (of course the proof of that pudding will be in the eating and how the R/M reacts to my advice and directions herein). I must say, however, that I was more than somewhat dismayed to hear the reaction of those truly opposing the R/M since either they did not understand the request or they refused to try to understand it. The "answers" they came back with did not fit or even resemble the "questions". Perhaps it is that these parties have been fighting each other for too long. In this regard, I must reiterate my concern for the sake of public health and safety. People like the Hodgsons should not have become pawns in this game of chess. I share the Joint Board's concern (see Joint Board's May 14, 1994 clarification):

> Nearby property owners and the natural environment should not suffer due to prolonged arguments about who should pay for mitigation.

9 Allow me to note several items:

10 (a) The Settlement Agreement of July 26, 1994 provides:

> 1. PWL will remain as Receiver and Manager until the Leachate Collection System as described in the Development and Operations Report dated September, 1991 by Henderson, Paddon & Associates Limited is installed and operational.
>
> 2. PWL will cause the Leachate Collection System to be installed as soon as possible, the cost of such installation to be billed to the MOEE for payment out of the balance of the security fund established for the site.
>
> 3. [PWL also agreed to do capping measures as agreed on April 25, 1994 meeting.]

11 Thus the Settlement Agreement requires PWL to complete the Leachate Collection System and the capping. Not to do so would be a breach of the settlement by PWL (unless it had just legal cause). During the period of installing the Leachate Collection System to the stage of it being operational, PWL has also agreed to remain as Receiver and Manager. One however could see PWL as the operational phase neared reality obtaining a court date for a discharge and termination of the receivership. Under the wording of the Settlement Agreement it would appear that this motion would be heard at the same time as the adjourned MOEE motion and the Hodgsons' motion given the reference in para. 5 of the Settlement Agreement to a (singular) date to be agreed upon and fixed by the Registrar of this List.

12 (b) I was also referred to the Joint Board's decision of April 5, 1994 [reported at 13 C.E.L.R. (N.S.) 170 (Ont. Joint Bd.)], its clarification of May 13, 1994 and the Director's decision of September 16, 1994 (and attachments). I understand the draft decision of July 4, 1994 circulated amongst the parties to have been materially the same for all intents. I thought it quite helpful for Mr. Coop to give me a "précis" of the immediate history and jurisdiction.

13 I further understand that PWL's position is that there are no "funds" in the receivership, at least monies of the magnitude needed to carry out the subject work — neither the Leachate Collection System which I recall is in the neighbourhood of $800,000 nor a fortiori the forcemain and pumping station, estimated at some $2.5 million. While

apparently the AG and the MOEE dispute this impecuniosity of the receivership and reserve under the settlement the right to inspect the R/M's accounts on reasonable notice, it is also clear that the MOEE agreed because of the alleged impecuniosity that the Leachate Collection System would be billed to the security fund (but subject to a motion for reimbursement). Thus, it would appear to be reasonable to assume that the same funding problem still exists in the receivership absent any new information which has thus far not been forthcoming.

April 5, 1994 Order

14 (a) p. 36 — If [PWL as R/M] cannot or will not comply with such an order then it can approach the Court and seek a termination of the receivership.

15 (b) p. 48 (i) Given the proximity of private property and significant natural features, [PWL as R/M] and/or the Ministry should implement proper leachate mitigation immediately. (ii) Duplicate of p. 36 cited above.

16 (c) p. 49 — The Director has a legislated mandate to uphold the purpose and provisions of the EPA (*Environmental Protection Act*) and the OWRA (*Ontario Water Resources Act*). If the proponent does not promptly install the necessary leachate management system, the MOEE has a responsibility to ensure it is installed.

17 (d) p. 50 — The Joint Board "deferred" (this apparently means "delegated") the obligation to the Director to determine detailed requirements for a leachate collection and management system. Under 1d [PWL as R/M] and the MOEE were to report back to the Joint Board within 90 days as to progress on condition 1a, b and c. [This would imply that this report should have been by early July which would in turn imply that the Director would have given his decision prior to that time.]

May 13, 1994 Clarification

18 (e) The Board's [April 4, 1994] Order requires the implementation of a leachate management system and creates responsibility on the part of the Receiver and Manager of the Innisfil Landfill (Price Waterhouse Limited) to comply with this Order. The Board draws the attention of the parties to the following passage of s. A(4) of its April 5, 1994 Reasons for Rulings and Order [at pp. 220-221]:

> A(4) The [PWL as R/M] responsibility to comply with the relevant regulatory environment and legislation is confirmed by the cited authorities and paragraph 19 of the Court Order. Given the context of the receivership and the Certificates regulating the operation of the site, other responsibilities also exist. These responsibilities involve the development, approval and timely introduction of proper leachate management and the prompt pursuit of an EPA hearing for the expanded use of the site. In the Board's opinion, the proponent's responsibilities should be viewed within this context. After considering paragraphs 3 and 19 of the Court Order, the Board believes it is reasonable and appropriate to issue an Order that is consistent with the goals and provisions of the relevant legislation and regulatory regime (eg. EPA ss. 2 and 39, OWRA s. 26(1)). If the proponent cannot or will not comply with such an order then it can approach the Court and seek the termination of the receivership.

Price Waterhouse Limited, in its role as Receiver and Manager of the Innisfil Landfill, is required to implement the Board's April 5, 1994 Order. However, the Board believes that better leachate management should be promptly implemented even if Price Waterhouse Limited discontinues its involvement with the site. The Board's Reasons for Rulings contained the following relevant comment [at p. 221]:

> If the proponent does not promptly install the necessary leachate management system, the MOEE has a responsibility to ensure it is installed. Nearby property owners and the natural environment should not suffer due to prolonged arguments about who should pay for mitigation ....

Director's Decision September 16, 1994

19 (f) p. 7 — PWL will require a s. 53 OWRA approval to construct the forcemain. It should apply to receive that approval and whatever further and other approvals may be required (e.g. *Planning Act*, etc.). In the interim, there may be a need to dispose of the collected leachate through alternative means [trucked leachate to the Barrie WPCP agreed as acceptable interim solution].

20 (g) [Regarding PWL's counsel's inquiry of July 5, 1994 concerning the Ministry's responsibilities in this matter and the effect of the receivership order], the Director repeats his July 15, 1994 letter. This includes:

> again, as to the extent of, and reasons for, PWL's alleged financial inability to perform the work ordered by the Joint Board, those allegations did not prevent the Board from imposing liability upon PWL. Nor do I have a discretion to change the Board's Order based on these allegations. I suggest that the issue of financial liability is one which will be addressed on the motion to Commercial Court, and you should make your submissions there.

21 [The reference to this motion would appear to be the (adjourned by settlement of July 26, 1994) motion of PWL.]

Comments

22 In discussing this advice and direction I would wish to stress that I do not consider this to be an appeal of the Board's Order (including the deferred portion to the Director which apparently forms part of the Board's Order) nor a judicial review thereof. Nothing which I say herein should be taken or interpreted as such. I wish merely to provide PWL with its requested advice and directions as it is entitled to receive from this Court. To the extent that PWL has inside or outside the receivership incurred liability by virtue of operation of the environmental legislation or a decision of the Joint Board, I make no comment save the following. Some of the Board's language in its Order is so clear that it would be difficult to imagine that there could be other than a straightforward ordinary interpretation; in certain other areas there may be some question of precise intent (in this I mean no disrespect to the Board, as I am sympathetic enough as to the question of how to interpret [court] decisions including my own).

23 Given the various "invitations" contained in the foregoing, it would not appear that the Board was advancing the proposition that PWL could not apply to the Court for a discharge and termination of the receivership until any fixed time (either calendar of fulfilment of condition — e.g. completion and operation of the collection system or of the forcemain and pumping station). Thus, it would appear that the Settlement Agreement obligations are the only barriers to such a court application. This would appear to answer Mr. McDougall's question(a).

24 As to (b), as I have answered (a) in the way which I have I do not see that if PWL were successful in its discharge and termination motion that it would be obliged to install the forcemain and pumping station in the direct physical or physical supervisory sense. The Board would appear to have concluded that if PWL cannot or will not comply with the Board's Order, it should approach the Court and seek a termination of the receivership. It would seem a necessary implication of a successful motion in Court that PWL after termination of the receivership would not be required to directly or supervisorily physically install the forcemain and pumping station.

25 Rather if PWL does not so install the system (apparently with or without a termination of the receivership) the Board expects the MOEE to install (directly or supervisorily physical) the system.

26 That leaves the question of funding to be answered. We have seen the funding arrangement for the collection system under the Settlement Agreement. What of the rest? It would seem that if PWL continues as R/M it would be obliged to not only physically install but also to fund the work because of the Order of the Board. If the MOEE installed physically the work, then one would assume that the MOEE would initially fund it but it may well pursue PWL

for reimbursement (either because it feels there are "excess" receivership funds which should have been available or because PWL has a continuing obligation under the environmental legislation or the Board Order notwithstanding the termination of the receivership).

27 That last aspect would appear to be a somewhat open question. There are parts of the Board's Order which impose an obligation on PWL but it is to me at least somewhat unclear as to whether this liability affixes to PWL (i) in its general entity capacity (and is thereby ongoing no matter what happens to the receivership) or (ii) in its R/M capacity. In this latter position, there also seem to be two paths — (A) that a termination of the receivership and a discharge of PWL as R/M would relieve it from any ongoing responsibility not then accrued or (B) responsibility is to be fixed upon it as a result of it having been R/M at the time of the Board Order, which responsibility is not in the Board's view (and within what it sees as its jurisdiction) terminated by a Court termination of the receivership and a discharge of PWL as R/M.

28 While it appears clear that the Court Order appointing PWL as R/M contemplated in para. 11 that PWL's liability as R/M would be limited to net cash proceeds of the receivership, it may be that the Board in the proper exercise of its jurisdiction or the environmental (or other) legislation affecting the situation may impose a greater liability upon PWL. It would seem to me that PWL may find it helpful to ask for a further clarification from the Joint Board. It may be that once my endorsement has been typed up it would be of some assistance in pinpointing the areas of concern.

29 As discussed in the hearing one should clearly differentiate between the liability to do something and the liability to provide funding for it. Then there is the difference between a primary responsibility and a secondary one which comes into play if the person with the primary fails to do something on a timely basis. This later aspect also carries with it the principle of reimbursement.

30 I believe the Board is as concerned as I am that the squabbling between the MOEE/AG and PWL continues at a faster and greater rate than the physical implementation of the required systems needed for public health and safety. Cooperative efforts are far more productive; non-cooperative efforts merely raise the suspicions of the innocent party as to all future dealings (but then some always claim to be innocent and the other side non-innocent notwithstanding the overwhelming objective evidence to the contrary). I am, however, delighted to hear that notwithstanding this blowup both the MOEE/AG and PWL report that implementation of the Settlement Agreement is proceeding in a bona fide way with due dispatch.

31 In conclusion, I would merely observe that it is most helpful if the obligations of receiver/managers are spelled out (so that they can be easily known by the receiver/manager) in order that there be no unpleasant surprises of unexpected liabilities, especially if there is no realistic way to fund same. While that may be the hard result in a particular case, no doubt the law of economics (as well as fair play) will take over and there will be an absence of willing potential receiver/managers available to go into situations where they are needed. Who then will be available? Who then will be appropriately qualified? It is, of course, one thing to have a system or regime which works well — but only on paper and another which works well in practice.

32 It should be remembered that "once bitten, infinitely shy".

33 Costs: PWL awarded $1,500 payable forthwith by MOEE/AG. I see no reason why Ms. McCaffrey could not have more cooperativelyattempted to discuss and answer to the extent feasible and reasonable the aspects of Mr. McDougall's letter of September 23, 1994.

34 Postscript: The Board referred to paras. 3 and 19 of the Court Order. I presume this is the Order of Granger J. dated August 13, 1990. If so, I have some difficulty in relating para. 3 which appears to deal with PWL being able to examine persons under oath to be linked with PWL's responsibility under the Board's Order but I may be missing

something quite obvious. As to para. 19, at first blush this would appear to relate directly to the Court Order being a *non-impedance* of the MOEE in carrying out its duties and not directly impose liability or responsibility upon PWL although I note that of course PWL as Receiver and Manager may well have some liability by virtue of its activities and the legislation referred to of the EPA and the OWRA. Again, I note that I may be missing something obvious.

Order accordingly.

END OF DOCUMENT

2003 CarswellOnt 4537,

2003 CarswellOnt 4537

Bell Canada International Inc., Re

IN THE MATTER OF BELL CANADA INTERNATIONAL INC.

AND IN THE MATTER OF AN APPLICATION BY BELL CANADA INTERNATIONAL INC. UNDER SECTION 192 OF THECANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, as amended (the "CBCA")

Ont. S.C.J. [Commercial List]

Farley J.

Heard: October 29, 2003
Judgment: October 30, 2003
Docket: 02-CL-4553

Counsel: John T. Porter, Derrick C. Tay, Alan B. Merskey for BCI

Christine Snow for Directors of BCI

James H. Grout for Monitor

W. Grant Worden for BCE

J.L. McDougall, Q.C., Michael D. Schafler for Peter Legault

Frederick L. Myers for Horizon

Robert Staley for Hicks, Muse, Tate & Furst Inc., Davivo International Ltd.

Subject: Corporate and Commercial; Insolvency

Business associations --- Changes to corporate status — Amalgamations and takeovers — Takeovers — Miscellaneous issues

C Ltd. considered two bids for its shares — C Ltd. elected to accept bid by corporation H — Monitor scrutinizing bid process wrote report stating sale process conducted fairly and openly — Minority shareholder told monitor he had party interested in submitted higher bid, but no offer was received — BCI Inc. brought motion for order authorizing BCI Inc. to enter into voting agreement with H to vote its 75.6 per cent interest in common shares of C Ltd. in favour of sale agreement between C Ltd. and H — Order issued that BCI Inc., if authorized by its board, could enter into voting agreement with H, which obligated it to vote in favour of sale agreement — Report of monitor in proceedings

of this nature is evidence — Monitor, as officer of court, not necessarily barred from being cross-examined — Court officers may be examined or cross-examined in unusual circumstances — Motion would have been better supported by affidavit, but given limited nature of relief sought, it was not fatal that only monitor's report provided — Motion granted subject to determination by board and management of whether it was in best interests of BCI Inc. to vote in favour of sale agreement.

Cases considered by *Farley J.*:

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 908, 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) — considered

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — considered

Confederation Treasury Services Ltd., Re (1995), 37 C.B.R. (3d) 237, 1995 CarswellOnt 1169 (Ont. Bktcy.) — referred to

Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp. (1995), 30 C.B.R. (3d) 100, 3 O.T.C. 23, 1995 CarswellOnt 43 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — considered

s. 189 — referred to

s. 189(3) — referred to

s. 190 — referred to

s. 192(1) "arrangement" — referred to

s. 192(3) — referred to

MOTION by corporation for order authorizing it to enter into voting agreement with another corporation to vote its interest in common shares in third corporation in favour of sale agreement.

***Farley J.*:**

1 [1] This was a motion by Bell Canada International Inc. ("BCI") for an order:

(b) authorizing and approving the entry of BCI into a voting agreement (the "Voting Agreement") with Horizon, Cablevision do Brazil, SA ("Horizon") to vote its 75.6 percent interest in the common shares of Canbras Communications Ltd. ("Canbras") in favour of a sale agreement between Canbras and Horizon (the "Sale Agreement") pursuant to which Horizon proposes to acquire substantially all of Canbras' assets (the "Canbras Sale Transaction").

2003 CarswellOnt 4537,

2 [2] It appears to me that all interested persons have been duly served, including Peter Legault ("L"), a minority shareholder of Canbras. L had originally been favourably disposed towards a bid by Elicio which was to acquire only BCI's shares in Canbras as this would allow him to continue as a shareholder of Canbras, a CBCA public corporation. It appears that the two bidders who were selected for further negotiations (Horizon and Hicks) were advised in early June 2003 by Canbras that the Board of Canbras would meet on June 23, 2003 to make a final decision on which of the two bids to pursue, and wanted both Horizon and Hicks to submit final bids. Horizon's final bid was for the CPAR shares (the holding company subsidiary of Canbras) while Hicks bid for all the shares of Canbras. Apparently, the two bids were compared after adjustment on an apples for apples, oranges for oranges basis, and the Horizon bid was determined to be substantially higher than the Hicks bid (which was determined to be subject to significant closing conditions that had a high risk of not being met).

3 [3] No one has submitted any further bid or proposal of any nature or sort. However, L contacted the BCI Monitor on October 14, 2003, indicating that he had a party that was interested in submitting a bid at a price higher than the proposed Horizon transaction (the salient terms of which, including price, had been publicly disclosed on October 8, 2003). L advised the interested party was a combination of Hicks and Elicio who would make a joint offer for all the shares of Canbras. (There appears to be some possible discrepancy here as a bid for all shares of Canbras would in fact negate L's desire to remain a shareholder of Canbras). On October 20, 2003, L contacted the Monitor and advised that the Monitor would likely receive a letter with details of the offer by October 24, 2003. No such offer has yet been received.

4 [4] According to L, Hicks advised with respect to a continuation of bidding in the spring of 2003 that Hicks would not unilaterally increase its bid, but would be prepared to top another bid (which assumes that this was part of the process - which it appears it was not - and that Hicks would be advised of the price and other terms of the other bid; this presumes that the other bidder would be similarly advised of Hick's bid, but this type of process is certainly belied by the very significant bid jump by Horizon).

5 [5] At paragraph 28 of its report, the Monitor stated:

> 28. Based on its procedures as outlined above, the Monitor is satisfied that the Canbras sale process was conducted fairly and openly, that all interested parties were given a commercially reasonable opportunity to submit offers to Canbras and that a "level playing field" was maintained at all times.

6 [6] L disputes that the Monitor's report is evidence but gives no basis for such a submission. With respect, I disagree. I do not think it necessary to delve deeply into this question but I do think it suffice to observe that such a report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding. For instance, see John Henry Wigmore, *Evidence in Trials at Common Law* (Little Brown & Company, Toronto & Boston; 1974) at pp. 791-6, Volume 5 (section 1670) discusses the ancient origins of reports being received as admissible evidence, stating at p. 791:

> A report is to be distinguished from a return, as already defined (s. 1664 supra,) in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement - "inquisition" or "inquest" - suggest more clearly its special quality, namely that of resting upon means of information other than original personal observation.
>
> Now an inquisition or report, if made under due authority, stands upon no less favourable a footing than other official statements. As a statement made under official authority, or duty, it is admissible under the general principle (sc 1633, 1635 supra).

7 [7] Sir Gavin Lightman and Gabriel Moss, *The Law of Receivers and Administrators of Companies* (3rd ed., 2000; Sweet & Maxwell, London) at p. 115 distinguishes between the capacity and quality of "officer-holder" and "officer of the court."

> Officers of the court [such as court appointed receivers) (Chap. 22), administrator (Chap. 23), provisional liquidators and liquidators in a compulsory liquidation (Chap. 2)] are appointed by the Court and are subject to its general supervisory jurisdiction. In accordance with the rule in ex p. James [(1874) 9 Ch. App. 609] officers of the Court are obliged not only to act lawfully, but fairly and honourably.

8 [8] L submitted that the Monitor, as an officer of the court, cannot be cross examined (citing *Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (Ont. C.A.) at paras. 31-32; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) at para. 5; *Anvil Range Mining Corp., Re*, [2001] O.J. No. 1125 (Ont. S.C.J. [Commercial List]) at paras. 3-4). With respect, that is an oversimplification or an overstatement as is clearly seen by my observations at paras. 3-4 of *Anvil Range Mining Corp.* including the cite from *Innisfil*:

> (3) The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.
>
> (4) See *Mortgage Insurance Co. v. Innisfil Landfill Corp.* (1995) 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 101-2 where I stated:
>
> > As to the question, of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs
> >
> > of the Commercial List - cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is truly needed.
>
> The jurisprudence which I referred to included *Re Mr. Greenjeans Corp.* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.J.) and *Avery v. Avery*, [1954] O.J. No. 67, (H.C.J.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. QB) at p. 30. See also paper *"Canadian Airlines - The Last Tango in Calgary"* by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

9 As will be seen by that cite, a court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must

take into account the objectivity and neutrality of the officer of the court (see *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

10 [9] L raised a concern about this motion by BCI not being supported by anything other than the Monitor's report. This concern has been raised as a general problem quite recently. I have indicated within the past month that, in my view, it is desirable to have an affidavit from someone in the moving party's camp if the matter is reasonably expected to be contentious. If a matter turns contentious, it may be necessary to provide such an affidavit before the hearing with sufficient time to cross examine on it if necessary or to adjourn the hearing to allow for same (the exigencies of the situation may require otherwise if there is urgency). The provision of an affidavit is not of course a mandatory invitation to cross examine in the sense of delaying what must be accomplished on a timely basis, if it is to be accomplished at all (in other words, inappropriate delay should not be allowed to kill an otherwise meritorious motion). The Commercial List is well populated by counsel who have warmly embraced the 3Cs of communication, cooperation (at least in procedural matters) and common sense; I know there will be no problem with this question of unwarranted delay if the 3Cs continue to be observed.

11 [10] Here there was only the Monitor's report; in my view it would have been preferable to have had an affidavit (possibly, for instance, from Mr. Hendricks or from a representative of Credit Swiss First Boston, advisor to Canbras). However, given the limited nature of the relief requested by this motion - and the limited nature of the order which in fact can be granted, I do not see that the failure to provide such an affidavit is fatal.

12 [11] At para. 30 of its report, the Monitor has advised the Court and the parties:

> 30. Based on the above procedures, the Monitor is satisfied that the proceeds to be realized from the Canbras Sale Transaction maximize amounts available for distribution to the BCI Stakeholders. (emphasis added)

13 As a side note, I would observe that the Monitor here correctly proceeded by providing a "main" report which was circulated with enough time to allow reflection and a "follow up" report to advise as to any intervening matters on an up to date basis.

14 [12] There has been no prior request to this Court to deal with anything at the Canbras (or lower) level and certainly nothing with respect to the marketing process. The Canbras transaction is proceeding as an "ordinary" sale transaction as governed by s. 189(3) specifically of the CBCA and s. 189 generally. This will involve a right to dissent under s. 190. One may observe that consideration will also have to be given to s. 192(1) and (3). I also stressed that aside from the other concerns in this paragraph, nothing that this Court does in respect of this motion should be taken as authorizing, approving, sanctioning or otherwise dealing with the activities of the board and management of BCI, Canbras or any other lower tier subsidiary; in other words, any order I may grant in respect of this motion will not, nor is it intended, to create either a shield or a sword with respect to any oppression or other claim.

15 [13] I observed that the voting agreement which was handed up was ambiguous as to the quality of the court approval sought and that it needed to be revised. The Court does not have a copy of the Sale Agreement; it was withheld from the parties as being confidential and sensitive. The Court in no way is to be taken as approving the terms of the Sale Agreement. It is up to the board and the management to determine if it is in the best interests of BCI to vote in favour (I assume they have made that decision). Given the Monitor's conclusion in para. 30 of its report, I see no reason to prevent that vote from taking place.

16 [14] In conclusion, the Court orders that BCI (if authorized by its Board) may enter into a voting agreement

2003 CarswellOnt 4537,

with Horizon which obligates it to vote in favour of the Sale Agreement in respect of a vote pursuant to s. 189(3) of the CBCA (including any terms which are reasonably ancillary to that).

Order accordingly.

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2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

R. v. Khelawon

Her Majesty the Queen (Appellant) and Ramnarine Khelawon (Respondent) and Attorney General of British Columbia and Criminal Lawyers' Association (Ontario) (Interveners)

Supreme Court of Canada

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron JJ.

Heard: December 16, 2005
Judgment: December 14, 2006
Docket: 30857

Proceedings: affirming *R. v. Khelawon* (2005), 26 C.R. (6th) 1, 2005 CarswellOnt 720, 194 C.C.C. (3d) 161, 195 O.A.C. 11 (Ont. C.A.)

Counsel: John S. McInnes, Eliott Behar for Appellant

Timothy E. Breen for Respondent

Alexander Budlovsky for Intervener, Attorney General of British Columbia

Louis P. Strezos, Joseph Di Luca for Intervener, Criminal Lawyers' Association (Ontario)

Subject: Criminal; Evidence

Evidence --- Hearsay — Principled approach — Necessity

S, 81-year-old resident of nursing home, was discovered in his room by staff member, badly injured — S told staff member that accused, K, manager of nursing home, had beaten and threatened him — After several days, S visited doctor and said he'd been hit in face and body with cane or pipe — Doctor found that injuries were consistent with S's account but that they also could have been caused by fall — Following day, S made videotaped statement at police station but was not under oath — Police took videotaped statements from four other residents of nursing home or their representatives, including D — At trial, judge admitted all five videotaped statements — K was convicted on charges relating to S and D and acquitted of charges relating to other residents — K successfully appealed his conviction — Crown brought appeal — Appeal dismissed — Provincial court of appeal was correct in finding that trial judge erred in admitting videotaped statements — Although due to S's death, threshold of necessity was met, his videotaped statement was not sufficiently trustworthy to meet threshold of reliability — In determining admissibility of hearsay under principled approach, all relevant factors should be considered — Under circumstances, S's unavailability for

cross-examination posed significant limitations on accused's ability to test evidence and on trier of fact's ability to assess it.

Evidence --- Hearsay — Principled approach — Reliability

S, 81-year-old resident of nursing home, was discovered in his room by staff member, badly injured — S told staff member that accused, K, manager of nursing home, had beaten and threatened him — After several days, S visited doctor and said he'd been hit in face and body with cane or pipe — Doctor found that injuries were consistent with S's account but that they also could have been caused by fall — Following day, S made videotaped statement at police station but was not under oath — Police took videotaped statements from four other residents of nursing home or their representatives, including D — At trial, judge admitted all five videotaped statements — K was convicted on charges relating to S and D and acquitted of charges relating to other residents — K successfully appealed his conviction — Crown brought appeal — Appeal dismissed — Provincial court of appeal was correct in finding that trial judge erred in admitting videotaped statements — Although due to S's death, threshold of necessity was met, his videotaped statement was not sufficiently trustworthy to meet threshold of reliability — In determining admissibility of hearsay under principled approach, all relevant factors should be considered — Under circumstances, S's unavailability for cross-examination posed significant limitations on accused's ability to test evidence and on trier of fact's ability to assess it.

Evidence --- Hearsay — Exceptions — Where declarant or testimony unavailable — Statement by deceased

S, 81-year-old resident of nursing home, was discovered in his room by staff member, badly injured — S told staff member that accused, K, manager of nursing home, had beaten and threatened him — After several days, S visited doctor and said he'd been hit in face and body with cane or pipe — Doctor found that injuries were consistent with S's account but that they also could have been caused by fall — Following day, S made videotaped statement at police station but was not under oath — Police took videotaped statements from four other residents of nursing home or their representatives, including D — At trial, judge admitted all five videotaped statements — K was convicted on charges relating to S and D and acquitted of charges relating to other residents — K successfully appealed his conviction — Crown brought appeal — Appeal dismissed — Provincial court of appeal was correct in finding that trial judge erred in admitting videotaped statements — Although due to S's death, threshold of necessity was met, his videotaped statement was not sufficiently trustworthy to meet threshold of reliability — In determining admissibility of hearsay under principled approach, all relevant factors should be considered — Under circumstances, S's unavailability for cross-examination posed significant limitations on accused's ability to test evidence and on trier of fact's ability to assess it.

Preuve --- Ouï-dire — Méthode d'analyse raisonnée — Nécessité

S, un homme âgé de 81 ans qui habitait dans une maison de soins infirmiers, a été trouvé gravement blessé dans sa chambre par un des employés — S a dit à l'employé que l'accusé K, le directeur de la maison, l'avait frappé et l'avait menacé — Après plusieurs jours, S a vu un médecin et il lui a dit qu'il avait été frappé au visage avec une canne ou un tuyau — Médecin a estimé que les blessures étaient compatibles avec le récit de S, mais qu'elles pouvaient aussi avoir été causées par une chute — S a fait une déclaration enregistrée sur bande vidéo au poste de police le lendemain, mais cette déclaration n'a pas été faite sous serment — Policiers ont également recueilli des déclarations enregistrées sur bande vidéo de quatre autres personnes habitant dans la maison ou de leur représentant, dont D — Au procès, le juge a admis en preuve les cinq déclarations enregistrées sur bande vidéo — K a été déclaré coupable des accusations relatives à S et D et a été acquitté des accusations relatives aux autres personnes — K a interjeté appel avec succès de sa condamnation — Ministère public a interjeté appel — Pourvoi rejeté — Cour d'appel provinciale a correctement conclu que le juge du procès avait commis une erreur en admettant les déclarations enregistrées sur bande vidéo — Même si l'exigence de nécessité était satisfaite en raison du décès de S, la déclaration enregistrée de ce dernier n'était pas suffisamment fiable pour satisfaire à l'exigence de fiabilité — Pour déterminer l'admissibilité de la preuve par ouï-dire selon la méthode d'analyse raisonnée, il faut tenir compte de tous les éléments pertinents — Dans les cir-

constances, l'impossibilité de contre-interroger S limitait sérieusement la capacité de l'accusé de vérifier la preuve et la capacité du juge des faits de l'apprécier.

Preuve --- Ouï-dire — Méthode d'analyse raisonnée — Fiabilité

S, un homme âgé de 81 ans qui habitait dans une maison de soins infirmiers, a été trouvé gravement blessé dans sa chambre par un des employés — S a dit à l'employé que l'accusé K, le directeur de la maison, l'avait frappé et l'avait menacé — Après plusieurs jours, S a vu un médecin et il lui a dit qu'il avait été frappé au visage avec une canne ou un tuyau — Médecin a estimé que les blessures étaient compatibles avec le récit de S, mais qu'elles pouvaient aussi avoir été causées par une chute — S a fait une déclaration enregistrée sur bande vidéo au poste de police le lendemain, mais cette déclaration n'a pas été faite sous serment — Policiers ont également recueilli des déclarations enregistrées sur bande vidéo de quatre autres personnes habitant dans la maison ou de leur représentant, dont D — Au procès, le juge a admis en preuve les cinq déclarations enregistrées sur bande vidéo — K a été déclaré coupable des accusations relatives à S et D et a été acquitté des accusations relatives aux autres personnes — K a interjeté appel avec succès de sa condamnation — Ministère public a interjeté appel — Pourvoi rejeté — Cour d'appel provinciale a correctement conclu que le juge du procès avait commis une erreur en admettant les déclarations enregistrées sur bande vidéo — Même si l'exigence de nécessité était satisfaite en raison du décès de S, la déclaration enregistrée de ce dernier n'était pas suffisamment fiable pour satisfaire à l'exigence de fiabilité — Pour déterminer l'admissibilité de la preuve par ouï-dire selon la méthode d'analyse raisonnée, il faut tenir compte de tous les éléments pertinents — Dans les circonstances, l'impossibilité de contre-interroger S limitait sérieusement la capacité de l'accusé de vérifier la preuve et la capacité du juge des faits de l'apprécier.

Preuve --- Ouï-dire — Exceptions — Lorsque le déclarant ou le témoignage n'est pas disponible — Déclaration du défunt

S, un homme âgé de 81 ans qui habitait dans une maison de soins infirmiers, a été trouvé gravement blessé dans sa chambre par un des employés — S a dit à l'employé que l'accusé K, le directeur de la maison, l'avait frappé et l'avait menacé — Après plusieurs jours, S a vu un médecin et il lui a dit qu'il avait été frappé au visage avec une canne ou un tuyau — Médecin a estimé que les blessures étaient compatibles avec le récit de S, mais qu'elles pouvaient aussi avoir été causées par une chute — S a fait une déclaration enregistrée sur bande vidéo au poste de police le lendemain, mais cette déclaration n'a pas été faite sous serment — Policiers ont également recueilli des déclarations enregistrées sur bande vidéo de quatre autres personnes habitant dans la maison ou de leur représentant, dont D — Au procès, le juge a admis en preuve les cinq déclarations enregistrées sur bande vidéo — K a été déclaré coupable des accusations relatives à S et D et a été acquitté des accusations relatives aux autres personnes — K a interjeté appel avec succès de sa condamnation — Ministère public a interjeté appel — Pourvoi rejeté — Cour d'appel provinciale a correctement conclu que le juge du procès avait commis une erreur en admettant les déclarations enregistrées sur bande vidéo — Même si l'exigence de nécessité était satisfaite en raison du décès de S, la déclaration enregistrée de ce dernier n'était pas suffisamment fiable pour satisfaire à l'exigence de fiabilité — Pour déterminer l'admissibilité de la preuve par ouï-dire selon la méthode d'analyse raisonnée, il faut tenir compte de tous les éléments pertinents — Dans les circonstances, l'impossibilité de contre-interroger S limitait sérieusement la capacité de l'accusé de vérifier la preuve et la capacité du juge des faits de l'apprécier.

The cook in a nursing home discovered that S, an 81-year-old resident, had sustained serious injuries. S told the cook that the night before K, the manager of the nursing home, had entered his room, beaten him and then told him to leave the residence by noon the next day or else K would kill him.

Several days later, after bringing S to her home, the cook took him to be examined by a doctor. The doctor found that S's injuries were consistent with his story of having been beaten with a pipe or a cane. However, the doctor also posited that S might have sustained his injuries in a fall.

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

The following day, the cook took S to the police station, where he gave a videotaped statement about being beaten by K. Although S's statement was not made under oath, he was warned of the importance of being truthful. Police visited the nursing home and took statements from several other residents or their representatives. Of these, four were videotaped, including D's statement.

K was charged with aggravated assault on S and threatening to cause him death. He was also charged with aggravated assault and assault with a weapon on D and assault causing bodily harm on the other three complainants.

S's medical records showed that he was occasionally depressed, angry and paranoid. He also complained of weakness and dizziness. Although in his videotaped statement, S was generally responsive to questions from the police, he also complained at length about the general management of the nursing home.

At the time of S's alleged beating, the cook had been given notice by K. According to the doctor who examined S, the cook may have assisted S in relaying his account.

By the time K came to trial two and a half years later, no complainants were available to testify; they had either died or become incompetent.

The trial judge admitted all videotaped statements, based largely on their striking similarity to each other. Although the statements of S and D were hearsay, the trial judge found them sufficiently credible to convict K of all charges in relation to the two men. K was acquitted of all charges relating to the other residents.

K successfully appealed his convictions. The majority of the Ontario Court of Appeal excluded the hearsay statements and acquitted the accused of all charges. The dissenting judge would have admitted S's statement and would have upheld the convictions related to S.

The Crown appealed the acquittals in relation to S and was denied leave to appeal the acquittals in relation to D.

Held: The appeal was dismissed.

The trial judge erred in admitting hearsay evidence in the form of S's videotaped statement to the police under the principled exception of necessity and reliability. Although the necessity of the evidence was clear, its threshold reliability was insufficient to overcome the danger that its prejudicial effect could outweigh its probative value.

All relevant factors should be considered in assessing threshold reliability, including those that, in previous decisions of the court, had been viewed as relevant only to ultimate reliability.

The circumstances did not support the trustworthiness of S's statement. S's mental competence was in question, as was his ability to understand the consequences of making his statement. There was some indication that his complaint might have been influenced by the cook, who was a disgruntled employee, as well as by his own underlying dissatisfaction with the nursing home. It was also possible that his injuries had been caused by a fall rather than a beating. S's unavailability for cross-examination posed serious difficulties to the accused's ability to challenge the evidence and to the trier of fact's ability to assess its worth.

The trial judge based the admission of the hearsay evidence on the striking similarity between the statement made by S and those made by other residents. However, the majority of the Court of Appeal found that the principle of striking similarity applied only to statements describing the same incident. Strikingly similar statements relating to separate incidents might have bolstered the ultimate reliability of the videotape. However, the trial judge erred in applying this approach to the assessment of its threshold reliability. The similarity of the accounts of different incidents was ir-

relevant to the issue of admissibility.

There was a possibility that in an appropriate case, a striking similarity between statements made by different complainants could warrant the admission of hearsay evidence. However, the Court of Appeal correctly pointed out that the comparator statements must also be substantively admissible. The statements made by other residents posed even greater difficulties than S's statement and therefore could not be admitted to assist in assessing the reliability of S's allegations.

Previous decisions by the court required clarification and, to some degree, reconsideration. Factors relevant to admissibility cannot always be categorized as being related to either threshold reliability or to ultimate reliability. The court should adopt a more functional approach in considering the particular dangers raised by hearsay evidence as well as other attributes or circumstances. The relevance of each factor should depend on the specific dangers that arise from the hearsay nature of the evidence as well as whether there are any available means by which to overcome these problems.

The videotaped statement made by S to the police did not meet the reliability requirement. The majority of the Court of Appeal was correct in ruling that it was inadmissible. The acquittal of K was therefore upheld.

La cuisinière d'une maison de soins infirmiers a trouvé S, un homme âgé de 81 ans qui habitait dans la maison, alors qu'il était gravement blessé. S lui a dit que la veille, K, le directeur de la maison, était entré dans sa chambre, l'avait frappé, puis lui avait dit de quitter la résidence avant midi le lendemain, sinon il le tuerait.

La cuisinière a amené S chez elle et, plusieurs jours plus tard, l'a amené voir un médecin. Ce dernier a estimé que les blessures de S étaient compatibles avec son récit, soit qu'il avait été frappé avec une canne ou un tuyau. Cependant, le médecin était aussi d'avis que les blessures de S pouvaient avoir été causées par une chute.

Le lendemain, la cuisinière a amené S au poste de police, où ce dernier a fait une déclaration enregistrée sur bande vidéo relativement au fait d'avoir été frappé par K. Même si la déclaration de S n'a pas été faite sous serment, S avait cependant été averti qu'il était important de dire la vérité. Les policiers se sont rendus à la maison de soins infirmiers et ont obtenu des déclarations de plusieurs autres résidents ou de leur représentant. Quatre de ces déclarations ont été enregistrées sur bande vidéo, dont celle de D.

K a été inculpé de voies de fait graves et de menaces de mort à l'endroit de S. Il a également été inculpé de voies de faits graves et de voies de fait armées à l'endroit de D et de voies de fait causant des lésions corporelles à l'endroit de trois autres plaignants.

Le dossier médical de S révélait que celui-ci était parfois dépressif, en colère et paranoïaque. Il se plaignait également de faiblesse et d'étourdissements. Dans sa déclaration enregistrée, S était généralement réceptif aux questions des policiers, mais il s'est aussi abondamment plaint de la gestion générale de la maison de soins infirmiers.

La cuisinière avait déjà reçu de K un avis de cessation d'emploi au moment où S aurait été frappé. Le médecin qui avait examiné S avait indiqué que la cuisinière avait peut-être aidé S à relater son récit.

Lorsque le procès de K a commencé deux ans et demie plus tard, aucun des plaignants ne pouvaient témoigner; ils étaient soit décédés soit devenus inhabiles à témoigner.

Le juge du procès a admis toutes les déclarations enregistrées en raison de la similitude frappante qui existait entre elles. Même si les déclarations de S et D étaient du ouï-dire, le juge a estimé qu'elles étaient suffisamment crédibles pour déclarer K coupable de toutes les accusations contre lui relativement aux deux hommes. K a été acquitté de toutes les accusations relatives aux autres résidents.

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

K a interjeté appel avec succès de ses condamnations. Les juges majoritaires de la Cour d'appel d'Ontario ont exclu les déclarations par ouï-dire et ont acquitté l'accusé de toutes les accusations. Le juge dissident aurait admis la déclaration de S et aurait confirmé les accusations en ce qui le concernait.

Le ministère public a interjeté appel des acquittements relatifs à S et s'est vu refuser l'autorisation d'interjeter appel des acquittements relatifs à D.

Arrêt: Le pourvoi a été rejeté.

Le juge du procès a commis une erreur en admettant, sur la base des exceptions de la nécessité et de la fiabilité, la preuve par ouï-dire constituée de la déclaration de S enregistrée sur bande vidéo par la police. Même si la nécessité de la preuve était claire, son seuil de fiabilité était insuffisant pour écarter le danger que son effet préjudiciable l'emporte sur sa valeur probante.

Tous les éléments pertinents doivent être pris en compte lorsqu'il s'agit d'apprécier le seuil de fiabilité, y compris ceux qui, dans des décisions antérieures de la cour, avaient été considérés comme pertinents seulement pour la fiabilité en dernière analyse.

Les circonstances de l'espèce n'établissaient pas la fiabilité de la déclaration de S. La capacité mentale de S était mise en doute, tout comme sa capacité de comprendre les conséquences de sa déclaration. Certaines choses indiquaient que sa plainte avait peut-être été influencée par la cuisinière, une employée mécontente, ou par sa propre insatisfaction à l'égard de la maison de soins infirmiers. Ces blessures pouvaient également avoir été causées par une chute plutôt que par des coups. L'impossibilité de contre-interroger S limitait sérieusement la capacité de l'accusé de contester la preuve ainsi que celle du juge des faits d'apprécier sa valeur.

Le juge du procès a admis la preuve par ouï-dire en raison de la similitude frappante existant entre la déclaration de S et celles faites par les autres résidents. Cependant, les juges majoritaires de la Cour d'appel ont conclu que le principe de la similitude frappante ne s'appliquait qu'aux déclarations décrivant le même événement. Des déclarations qui avaient une similitude frappante et se rapportaient à des événements distincts auraient pu renforcer la fiabilité en dernière analyse d'une vidéocassette. Cependant, le juge du procès a commis une erreur en appliquant cette méthode pour apprécier le seuil de fiabilité. Les similitudes existant entre les récits d'événements distincts n'étaient pas pertinents quant à la question de l'admissibilité.

Il est possible que, dans une affaire donnée, l'admission de preuve par ouï-dire soit justifiée en raison de l'existence d'une similitude frappante entre des déclarations faites par des plaignants différents. Cependant, la Cour d'appel a à juste titre souligné que les déclarations de comparaison doivent également être admissibles quant au fond. Les déclarations des autres résidents étaient encore plus problématiques et elles ne pouvaient ainsi être admises en preuve pour aider à apprécier la fiabilité des allégations de S.

Des décisions antérieures de la Cour nécessitaient des éclaircissemements, voire même d'être réexaminées. Les éléments se rapportant à l'admissibilité ne peuvent pas toujours être classés comme se rapportant au seuil de fiabilité ou à la fiabilité en dernière analyse. La cour devrait adopter une méthode plus fonctionnelle lorsqu'elle examine les dangers particuliers soulevés par la preuve par ouï-dire ainsi que par d'autres caractéristiques et circonstances. La pertinence de chaque élément doit dépendre des dangers spécifiques provoqués par le fait que la preuve est par ouï-dire ainsi que par la question de savoir s'il existe d'autres moyens pouvant être utilisés pour écarter ces problèmes.

La déclaration de S enregistrée sur bande vidéo par la police ne satisfaisait pas à l'exigence de fiabilité. Les juges majoritaires de la Cour d'appel ont jugé à bon droit qu'elle était inadmissible. L'acquittement de K était donc confirmé.

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

Annotation

This judgment on the hearsay rule is a tour de force. Justice Charron provides a detailed and instructive review of the current law of hearsay and in particular of the Court's principled approach which requires proof of necessity and reliability before hearsay evidence can be admitted. She takes us all back to first principles in rehearsing how hearsay should be identified and why judges should be mindful about admitting presumptively inadmissible hearsay. In identifying a "functional" approach she emphasises the need for flexibility in the approach to the factor of reliability. She finds this largely reflected in the Supreme Court's jurisprudence, which she fully reviews. The most important change in the law is that the Court in *Khelawon* expressly reversed *R. v. Starr*, [2000] 2 S.C.R. 144, 36 C.R. (5th) 1 to the extent that it divided factors into categories relevant to threshold and those relevant to ultimate reliability and forbad consideration of evidence extrinsic to the making of the statement. As the Court recognises without providing citations, most judges and commentators have found no wisdom in those quick and restrictive obiter. Laurie Lacelle, "The Role of Corroborating Evidence in Assessing the Reliability of Hearsay Statements for Substantive Purposes", (1999) 19 C.R. (5th) 376 long ago pointed out that not allowing consideration of extrinsic evidence such as medical evidence of bruises would have a detrimental and undesirable effect on the prosecution of domestic assault cases where, for example, the complainant's out-of-court statement speaks of assault causing bruises but she has now recanted.

Of course, as the ruling in *Khelawon* on the facts demonstrates, the existence of corroborating physical evidence will not necessarily be determinative on the issue of sufficient reliability. So too the Court stresses in its ruling on the facts that just because there are striking similarities in other statements there is to be no "rigid pigeon hole" admission (see expressly at para. 45). The catchword is case-by-case flexibility looking to all the facts. For those concerned by the length of pre-trial *voir dires* it is noteworthy that in *Khelawon* itself it was agreed that the *voir dire* on the statements would determine the result at trial.

In passing the Court confirms the ruling in *R. v. Mapara*, [2005] 1 S.C.R. 358, 28 C.R. (6th) 1 on the relationship between traditional exceptions and the principled approach. *Starr* seemed to promise that there would be a thorough review of each existing exception to see whether the principled requirements of necessity and reliability were met. Here the Court again accepts the *Mapara* ruling that traditional exceptions are presumptively valid. With the Court's own acceptance of the wide co-conspirator's exception in *Mapara* there seems little likelihood that existing exceptions will be re-configured. The only change so far is the reliability requirement of not under "circumstances of suspicion": the majority in *Starr* itself imposed on the present intent exception. On the other hand where the exception is narrow the principled approach is available as an avenue to admission in an appropriate case. See for example Hill J. in *R. v. West* (2001), 45 C.R. (5th) 307 (Ont. S.C.) who avoided the rigours of statutory business records requirements by going straight to the principled approach to admit a forensic report from an expert who was now deceased. See similarly Romilly J. in *R. v. Larsen* (2001), 42 C.R. (5th) 49 (B.C. S.C.) respecting hospital records.

Lower courts (see recently *R. v. Terrico* (2005), 31 C.R. (6th) 161 (B.C. C.A.)) have differed as to whether admissions of parties should also be subject to the necessity and reliability determination. In passing Charron J. makes an enigmatic comment that seems to suggest that such an inquiry should not occur:

Some of the traditional exceptions stand on a different footing, such as admissions from parties (confessions in the criminal context) and co-conspirators' statements: see *Mapara*, at para. 21. In those cases, concerns about reliability are based on considerations other than the party's inability to test the accuracy of his or her own statement or that of his or her co-conspirators. Hence, the criteria for admissibility are not established in the same way. [para. 65]

Don Stuart[FN1]

Cases considered by *Charron J.*:

R. v. Abbey (1982), [1982] 2 S.C.R. 24, 138 D.L.R. (3d) 202, 43 N.R. 30, 39 B.C.L.R. 201, 29 C.R. (3d) 193, 68

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

C.C.C. (2d) 394, [1983] 1 W.W.R. 251, 1982 CarswellBC 230, 1982 CarswellBC 740 (S.C.C.) — referred to

R. v. B. (K.G.) (1993), 19 C.R. (4th) 1, [1993] 1 S.C.R. 740, 61 O.A.C. 1, 148 N.R. 241, 79 C.C.C. (3d) 257, 1993 CarswellOnt 76, 1993 CarswellOnt 975 (S.C.C.) — considered

R. v. C. (B.) (1993), 12 O.R. (3d) 608, 1993 CarswellOnt 3842, 80 C.C.C. (3d) 467, 62 O.A.C. 13 (Ont. C.A.) — considered

R. v. Czibulka (2004), 2004 CarswellOnt 3721, 24 C.R. (6th) 152, 189 C.C.C. (3d) 199, 190 O.A.C. 1 (Ont. C.A.) — referred to

R. v. Dersch (1990), (sub nom. *Dersch v. Canada (Attorney General)*) [1991] 1 W.W.R. 231, (sub nom. *Dersch v. Canada (Attorney General)*) [1990] 2 S.C.R. 1505, (sub nom. *Dersch v. Canada (Attorney General)*) 60 C.C.C. (3d) 132, 1990 CarswellBC 1478, 1990 CarswellBC 1479, 43 O.A.C. 256, 77 D.L.R. (4th) 473, 50 C.R.R. 272, 36 Q.A.C. 258, 51 B.C.L.R. (2d) 145, 116 N.R. 340, 80 C.R. (3d) 299 (S.C.C.) — considered

R. v. Hawkins (1996), 1996 CarswellOnt 4063, 1996 CarswellOnt 4062, 111 C.C.C. (3d) 129, 30 O.R. (3d) 641 (headnote only), 2 C.R. (5th) 245, [1996] 3 S.C.R. 1043, 204 N.R. 241, 96 O.A.C. 81, 141 D.L.R. (4th) 193 (S.C.C.) — considered

R. v. Khan (1990), 113 N.R. 53, 79 C.R. (3d) 1, 41 O.A.C. 353, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, 1990 CarswellOnt 108, 1990 CarswellOnt 1001 (S.C.C.) — considered

R. v. Mapara (2005), 2005 CarswellBC 963, 2005 CarswellBC 964, 40 B.C.L.R. (4th) 203, [2005] 1 S.C.R. 358, 332 N.R. 244, 211 B.C.A.C. 1, 349 W.A.C. 1, 2005 SCC 23, [2005] 6 W.W.R. 203, 195 C.C.C. (3d) 225, 251 D.L.R. (4th) 385, 28 C.R. (6th) 1 (S.C.C.) — considered

R. v. Mills (1999), 180 D.L.R. (4th) 1, 1999 CarswellAlta 1055, 1999 CarswellAlta 1056, 139 C.C.C. (3d) 321, 248 N.R. 101, 28 C.R. (5th) 207, [1999] 3 S.C.R. 668, 75 Alta. L.R. (3d) 1, 69 C.R.R. (2d) 1, [2000] 2 W.W.R. 180, 244 A.R. 201, 209 W.A.C. 201 (S.C.C.) — referred to

R. v. O'Brien (1977), [1978] 1 S.C.R. 591, 1977 CarswellBC 403, 1977 CarswellBC 494, [1977] 5 W.W.R. 400, 38 C.R.N.S. 325, 35 C.C.C. (2d) 209, 16 N.R. 271, 76 D.L.R. (3d) 513 (S.C.C.) — referred to

R. v. Rose (1998), 1998 CarswellOnt 4392, 1998 CarswellOnt 4393, 40 O.R. (3d) 576 (headnote only), [1998] 3 S.C.R. 262, 115 O.A.C. 201, 57 C.R.R. (2d) 219, 6 B.H.R.C. 206, 232 N.R. 83, 166 D.L.R. (4th) 385, 20 C.R. (5th) 246, 129 C.C.C. (3d) 449 (S.C.C.) — considered

R. v. Smith (1992), 139 N.R. 323, 94 D.L.R. (4th) 590, 1992 CarswellOnt 997, 15 C.R. (4th) 133, 75 C.C.C. (3d) 257, [1992] 2 S.C.R. 915, 55 O.A.C. 321, 1992 CarswellOnt 103 (S.C.C.) — considered

R. v. Starr (2000), 2000 CarswellMan 449, 2000 CarswellMan 450, 36 C.R. (5th) 1, 2000 SCC 40, 190 D.L.R. (4th) 591, [2000] 2 S.C.R. 144, [2000] 11 W.W.R. 1, 147 C.C.C. (3d) 449, 148 Man. R. (2d) 161, 224 W.A.C. 161, 258 N.R. 250 (S.C.C.) — considered

R. v. U. (F.J.) (1995), 42 C.R. (4th) 133, 101 C.C.C. (3d) 97, 128 D.L.R. (4th) 121, 186 N.R. 365, 85 O.A.C. 321, [1995] 3 S.C.R. 764, 1995 CarswellOnt 555, 1995 CarswellOnt 1175 (S.C.C.) — considered

R. v. Wilcox (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45, 2001 CarswellNS 83, 192 N.S.R. (2d) 159, 599 A.P.R.

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

159 (N.S. C.A.) — referred to

Statutes considered:

Canada Evidence Act, R.S.C. 1985, c. C-5

s. 4 — referred to

s. 16 — referred to

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

s. 7 — referred to

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

ss. 709-714 — referred to

s. 715 — referred to

APPEAL by Crown from judgment reported at *R. v. Khelawon* (2005), 26 C.R. (6th) 1, 2005 CarswellOnt 720, 194 C.C.C. (3d) 161, 195 O.A.C. 11 (Ont. C.A.) acquitting accused of charges of aggravated assault, assault with a weapon and uttering death threats.

POURVOI du ministère public à l'encontre de l'arrêt publié à *R. v. Khelawon* (2005), 26 C.R. (6th) 1, 2005 CarswellOnt 720, 194 C.C.C. (3d) 161, 195 O.A.C. 11 (C.A. Ont.), qui a acquitté l'accusé à l'égard d'accusations de voies de fait graves, de voies de fait armées et de menaces de mort.

***Charron J.*:**

1. Overview

1 This appeal turns on the admissibility of hearsay statements under the principled case-by-case exception to the hearsay rule based on necessity and reliability. In particular, guidance is sought on what factors should be considered in determining whether a hearsay statement is sufficiently reliable to be admissible. This Court's decision in *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40 (S.C.C.), has generally been interpreted as standing for the proposition that circumstances "extrinsic" to the taking of the statement go to ultimate reliability only and cannot be considered by the trial judge in ruling on its admissibility. The decision has generated much judicial commentary and academic criticism on various grounds, including the difficulty of defining what constitutes an "extrinsic" circumstance and the apparent inconsistency between this holding in *Starr* and the Court's consideration of a semen stain on the declarant's clothing in *R. v. Khan*, [1990] 2 S.C.R. 531 (S.C.C.), the declarant's motive to lie in *R. v. Smith*, [1992] 2 S.C.R. 915 (S.C.C.), and most relevant to this case, the striking similarities between statements in *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764 (S.C.C.).

2 As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity.

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts. Just as traditional exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence were sufficiently alleviated, so too must be founded the overarching principled exception to hearsay. When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gate-keeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.

3 The distinction between threshold and ultimate reliability reflects the important difference between admission and reliance. Admissibility is determined by the trial judge based on the governing rules of evidence. Whether the evidence is relied upon to decide the issues in the case is a matter reserved for the ultimate trier of fact to decide in the context of the entirety of the evidence. The failure to respect this distinction would not only result in the undue prolongation of admissibility hearings, it would distort the fact-finding process. In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively *inadmissible*. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary in the context of the issue to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. Concerns over trial fairness not only permeate the decision on admissibility, but also inform the residual discretion of the trial judge to exclude the evidence even if necessity and reliability can be shown. As in all cases, the trial judge has the discretion to exclude admissible evidence where its prejudicial effect is out of proportion to its probative value.

4 As I will explain, I have concluded that the factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Comments to the contrary in previous decisions of this Court should no longer be followed. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.

5 In May 1999, five elderly residents of a retirement home told various people that they were assaulted by the manager of the home, the respondent, Ramnarine Khelawon. At the time of trial, approximately two and a half years later, four of the complainants had died of causes unrelated to the assaults, and the fifth was no longer competent to testify. Only one of the complainants had testified at the preliminary inquiry. The central issue at trial was whether the hearsay statements provided by the complainants had sufficient threshold reliability to be received in evidence. Grossi J. held that the hearsay statements from each of the complainants were sufficiently reliable to be admitted in evidence, based in large part on the "striking" similarity between them. He ultimately found Mr. Khelawon guilty of the offences in respect of two of the complainants, Mr. Skupien and Mr. Dinino, and acquitted him on the remaining counts. Mr. Khelawon was sentenced to two and a half years of imprisonment for the offences relating to Mr. Skupien and an additional two years for the offences related to Mr. Dinino.

6 On appeal to the Court of Appeal for Ontario, Rosenberg J.A. (Armstrong J.A. concurring) excluded all statements and acquitted Mr. Khelawon. Blair J.A., in dissent, would have upheld the convictions in respect of Mr. Skupien only. The Crown appeals to this Court as of right, seeking to restore the convictions relating to Mr. Skupien. The Crown also sought but was denied leave in respect of the charges relating to Mr. Dinino.

7 In my view, Mr. Skupien's videotaped statement to the police was inadmissible. Although Mr. Skupien's death

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

before the commencement of the trial made it necessary to resort to his evidence in this form, the statement was not sufficiently reliable to overcome the dangers it presented. The circumstances in which it came about did not provide reasonable assurances of inherent reliability. To the contrary, they gave rise to a number of serious issues including: whether Mr. Skupien was mentally competent, whether he understood the consequences of making his statement, whether he was influenced in making the allegations by a disgruntled employee who had been fired by Mr. Khelawon, whether his statement was motivated by a general dissatisfaction about the management of the home, and whether his injuries were caused by a fall rather than the assault. In these circumstances, Mr. Skupien's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and, in turn, on the trier of fact's ability to properly assess its worth. The statements made by other complainants posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of Mr. Skupien's allegations. In all the circumstances, particularly given that the Crown's case against Mr. Khelawon was founded on the hearsay statement, the admission of the evidence risked impairing the fairness of the trial and should not have been permitted. As Rosenberg J.A. aptly noted, the admission of the evidence under the principled approach to the hearsay rule is not the only way the evidence of witnesses who may not be available for trial may be preserved. Sections 709 to 714 of the *Criminal Code*, R.S.C. 1985, c. C-46, expressly contemplate this eventuality and provide a procedure for the taking of the evidence before a commissioner in the presence of the accused or his counsel thereby preserving both the evidence and the rights of the accused.

8 For reasons that follow, I would therefore dismiss the appeal and affirm the acquittals.

2. Background

9 Mr. Khelawon was charged with aggravated assault on Teofil Skupien and threatening to cause him death. He was also charged with aggravated assault and assault with a weapon on Atillio Dinino, and assault causing bodily harm on three other complainants. The offences were alleged to have occurred during the month of May 1999 and, at the time, all the complainants were residents at the Bloor West Village Retirement Home. Mr. Khelawon was the manager of the retirement home and his mother was the owner. As indicated earlier, none of the complainants was available to testify at trial. Hence, the central issue concerned the admissibility of their hearsay statements made to various people. There were 10 statements in total, four of which consisted of videotaped statements made to the police. The trial, held before Grossi J. without a jury, proceeded essentially as a *voir dire* into the admissibility of the evidence, with counsel agreeing that it would not be necessary to repeat the evidence about any statements later ruled admissible. None of the statements fit within any traditional exception to the hearsay rule. Their admissibility, rather, was contingent upon the Crown meeting the twin requirements of necessity and reliability under the principled approach to the hearsay rule, as established in *Khan*, *Smith* and, later, *Starr*.

10 The charges concerning Mr. Skupien are the only matters before this Court. I will therefore summarize the evidence concerning Mr. Skupien's statements in more detail. I will also describe the circumstances surrounding the taking of the statements from the other complainants to the extent that it is relevant to dispose of this appeal. The Crown sought to introduce three statements made by Mr. Skupien: the first to an employee of the retirement home, the second to the doctor who treated him for his injuries, and the third to the police. Only the latter was admitted at trial. I will describe each statement in turn.

2.1 Mr. Skupien's Statement to Ms. Stangrat

11 Mr. Skupien was 81 years old and, at the time of the events in question, he had lived at the Bloor West Village Retirement Home for four years. Mr. Skupien's initial complaint was made to one of the employees at the retirement home, Joanna Stangrat. Ms. Stangrat, also known under several other names, was a cook who had been working at the retirement home for a few months. She had come to know Mr. Skupien because he would often visit the kitchen and would sometimes walk her to the subway at the end of her shifts. Ms. Stangrat played a prominent role in the case concerning Mr. Skupien. In part, it was the theory of the defence at trial that she had influenced Mr. Skupien and the other complainants in making their complaints out of spite because Mr. Khelawon had given her a notice of termina-

tion a few weeks earlier.

12 On May 8, 1999, Ms. Stangrat noticed that Mr. Skupien did not come to breakfast. She went to check on him in his room and found him lying on his bed. His face was red and there was blood around his mouth. When she got closer to him she saw bruising on his eye and nose. His eyes were swollen. When Mr. Skupien saw her, he asked her to come in and close the door. He appeared to be in shock and very shaky. Ms. Stangrat noticed two full green garbage bags on the floor. She closed the door and asked him what had happened and what was in the green garbage bags. Mr. Skupien told her what had happened the previous evening. He also showed her bruises on his upper left chest area.

13 Mr. Skupien told Ms. Stangrat that he had to leave before twelve o'clock that day because "Tony", the name Mr. Khelawon went by, would come back and kill him. Mr. Skupien described to Ms. Stangrat how Mr. Khelawon had come into his room in anger at about 8:00 p.m. the previous evening, and had punched him repeatedly in the face and ribs. After beating him up, Mr. Khelawon had packed the clothes into the green garbage bags and left them on the floor. Ms. Stangrat asked Mr. Skupien why Mr. Khelawon would attack him in this way. He told her that Tony was angry because Mr. Skupien had been going to the kitchen when he had no reason to go there. When the assault ended, Mr. Khelawon threatened Mr. Skupien that either he moved out of the home by twelve noon the next day or he would return and kill him. Mr. Skupien asked her what he should do. Ms. Stangrat told him she would phone her daughter to come and get him and that he should stay in his room until she was finished her duties for the day.

14 Ms. Stangrat arranged for Mr. Skupien to stay at her daughter's home later that day, and then to her apartment. Mr. Skupien was in pain but he was scared and did not want to see a doctor at that time. Ms. Stangrat kept Mr. Skupien at her apartment where she and a friend of hers alternated caring for him. A few days later, Mr. Skupien agreed to go to the doctor. Ms. Stangrat and her friend took him to see Dr. Pietraszek.

2.2 Mr. Skupien's Statement to the Treating Physician

15 On May 12, 1999, Dr. Pietraszek examined Mr. Skupien. He found visible bruising to Mr. Skupien's face as well as bruises to his back and on the left side of his chest and noted that Mr. Skupien appeared to be in pain while breathing. X-rays revealed that he had suffered fractures to three ribs. Dr. Pietraszek testified that Mr. Skupien told him he had been hit in the face and body with something that was either a cane or a pipe. He denied any suggestion that Ms. Stangrat had related the story but acknowledged that she was present and may have helped him in describing what had happened. Dr. Pietraszek considered that the injuries were consistent with Mr. Skupien's account of how they were caused. He also testified that the injuries could have resulted from a fall.

2.3 Mr. Skupien's Videotaped Statement to the Police

16 The following day, on May 13, 1999, Ms. Stangrat took Mr. Skupien to the police. Detective Karpow took his complaint. He observed bruising to the left side of Skupien's face, in the eye area. He arranged for Mr. Skupien to give a videotaped statement. Both Detective Karpow and Cst. John Birrell were present. The statement was not given under oath; however, Mr. Skupien was asked if he understood that it was very important that he tell the truth and that if he did not tell the truth "[he] could be charged with that". Mr. Skupien answered "Yes" to both questions. After a few other preliminary questions, he was asked what his complaint was. Mr. Skupien described how, on May 7, 1999, Tony came to his room and said: "enough is enough". He then began beating him by slapping and punching him in the face, the ribs and all over, telling him not to go into the kitchen. He said that if he did not leave, he would come by 12 o'clock the next day and shoot him. Mr. Skupien then went on at some length to make several complaints about the general management of the retirement home until Detective Karpow brought him back to the matter at hand by asking him further questions about the incident and the events that followed. Mr. Skupien was generally responsive to the officer's questions.

17 After the interview was completed, Mr. Khelawon was arrested.

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

2.4 Further Investigation

18 Ms. Stangrat gave the police a list of other people that she thought they should speak to at the retirement home. The next day, on May 14, 1999, several police officers attended the home to seek these people out. Because there were no markings on the doors, the police had to search through the residence, speaking to residents and nursing staff. When some of the people were located, they were found to be "unresponsive" and no meaningful interviews could be conducted with them. Others, however, were able and willing to speak. The police would identify themselves as police, then ask the residents how things were going at the home and if anything had happened to them that they wanted to talk about. The police arranged to take videotaped statements from those who wanted to speak to them. These included three of the other complainants, Mr. Dinino, Ms. Poliszak and Mr. Grocholska. The fourth complainant, Mr. Peiszterer, could not communicate with the police; however, his son provided a videotaped statement.

2.5 Medical Records

19 On May 15, 1999, Det. Karpow attended at the retirement home and met with Dr. Michalski, a physician who attended regularly at the home to see the residents. On May 18, 1999, the police returned to the home and seized the medical records and a journal containing nursing notes.

20 Documentation from Mr. Skupien's file revealed that he had been living in an apartment before suffering a stroke in February 1995. He was transferred to the retirement home in April 1995. A report dated April 13, 1995 noted his condition after the stroke. He suffered occasional periods of confusion, could not go outside on his own, needed help with meal preparation and banking, and had to be reminded to take his medication, but was able to perform all self-care tasks.

21 Dr. Michalski's file noted frequent contact with Mr. Skupien during his stay at the retirement home. From time to time, he was described as "depressed", "aggressive", "angry", and "paranoid". A diagnosis of paranoid psychoses was made in June 1998 and medication was prescribed. In July 1998, "some improvement in paranoia" was noted. In August 1998, he was described as "angry, hostile" and his dosage was increased. In August 1998, he was described as "confused". The possibility of dementia was first noted. In September 1998, he was diagnosed with "depression" and prescribed medication. In September 1998, improvement with the depression was noted, and although apparently "eliminated" in January 1999, depression was again noted in February 1999. The notes also reflect a number of complaints of fatigue, weakness and dizziness.

2.6 Expert Evidence on the Voir Dire

22 Dr. Susan Lieff, a geriatric psychiatrist, was qualified to provide opinion evidence on the *voir dire* with respect to Mr. Skupien's capacity to understand the importance of telling the truth and communicate evidence. She also provided an opinion with respect to Mr. Dinino. Her opinion was based solely on her review of the videotaped interviews and medical records. With regard to Mr. Skupien, Dr. Lieff testified that the videotape did not reveal any impaired judgment, delusions or hallucinations, or intellectual pathology. He seemed to comprehend what was asked and responded appropriately. In Dr. Lieff's view, Mr. Skupien's affirmative answer "Yes", when advised of the need to be truthful, reflected a clear understanding. Dr. Lieff did not consult with Dr. Michalski but took issue with his diagnosis of "dementia". In her opinion, the symptoms observed by Dr. Michalski were more likely side-effects of the anti-psychotic medication he was taking at the time. Dr. Lieff concluded that Mr. Skupien understood that it was important to tell the truth and that he had the capacity to communicate evidence.

3. Trial Judge's Ruling on Admissibility

23 As a preliminary issue, the trial judge ruled that the four complainants who had given videotaped statements

were competent at the time within the meaning of s. 16 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, which he interpreted as requiring that "witnesses must know the importance of telling the truth and must be able to communicate the evidence". In support of this finding, the trial judge relied on his own viewing of the videotapes and on Dr. Lieff's opinion evidence. (The mental capacity of the hearsay declarant is a relevant factor on an inquiry into the statement's admissibility as it may impact on the reliability of the hearsay statement; however, it is important to note that s. 16 has no application here. Section 16 sets out the threshold competency requirement for receiving the testimony of a witness *in court*. The threshold is a low one and the witness's testimony, if received, is then subject to cross-examination in the usual way, including on any relevant matter concerning the witness's mental state. The inquiry into the admissibility of a hearsay statement may require more extensive probing into the declarant's mental competency at the time of making the statement when there is no opportunity to cross-examine the declarant.)

24 After determining the s. 16 issue, the trial judge considered the necessity criterion. Although certain questions were raised at trial as to whether this criterion was met with respect to some of the complainants' statements, none of the issues concerned Mr. Skupien and hence need not be reviewed here.

25 Finally, the trial judge turned to the question of threshold reliability. He determined that all videotaped statements to the police met the reliability requirement. In support of this finding, he noted that there was "nothing untoward in the police procedure in taking the statements" and, although three of the complainants' statements were taken at the retirement home, rather than at the police station, he found that the "circumstances of taking the statements [were] as formal and solemn as could be expected in the situation". He noted that there was "no animosity directed at the accused" by the complainants in their statements other than voicing their complaint. The complainants "appeared forthright", they were "not evasive", and they did not "attempt to overstate their injuries". There were no "exceedingly leading" questions and, to the extent that there was leading, it went to weight rather than admissibility. All the statements were contemporaneous or made shortly after the events that they described. They knew their assailant well and there was no realistic alternative suspect. Further, both Mr. Skupien and Mr. Dinino had corroborating injuries.

26 The crux of the trial judge's ruling, however, appears to have been his application of the decision of this Court in *U. (F.J.)* in which the complainant's out-of-court statement was admitted on the ground of its"striking similarity" with the accused's statement concerning the same events. Throughout his reasons, the trial judge made repeated references to the similarity between the statements and concluded that "the cumulative combination of similar points renders the overall similarity between the statements sufficiently distinctive to reject coincidence as a likely explanation". While he found that the oral statements were also "sufficiently similar to fit the principle in *R. v. U. (F.J.)*", he held, citing para. 217 in *Starr* as authority, that "to admit them would be oath-helping in that I have the video statements".

27 In the trial judge's view, the only real hearsay danger raised by the admission of the statements was the absence of cross-examination but, citing *Smith* as authority, he concluded that reliable evidence should not be excluded for this reason alone. The public interest in "the elderly receiving good care" allowed him "to take video statements together to bolster the complainants' credibility". He therefore ruled the videotaped statements admissible and the oral statements inadmissible.

28 At the conclusion of the trial, Grossi J. ultimately found only two of the videotaped statements sufficiently credible to found a conviction, those of Mr. Dinino and Mr. Skupien. Since this appeal concerns the admissibility ruling only, it is not necessary to review the reasons for conviction. It is common ground between the parties that if Mr. Skupien's statements are inadmissible, the convictions must be set aside and the appeal dismissed.

4. Court of Appeal for Ontario (2005), 195 O.A.C. 11 (Ont. C.A.)

29 Mr. Khelawon appealed his convictions on the ground that the trial judge erred in admitting the videotaped statements. The Court of Appeal was unanimous in finding that Mr. Dinino's statement was not sufficiently reliable to

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

warrant admission. A majority of the court found that Mr. Skupien's statement was also inadmissible due to its unreliability.

30 All three justices interpreted the trial judge's reasons as holding that without the similarity among the statements of the various complainants, none met the requirement of reliability and would therefore have been inadmissible (Rosenberg J.A., at para. 90; Blair J.A., at para. 29). The court therefore focussed on this aspect of the evidence and, indeed, the source of the disagreement between the majority and the dissent was whether the similarity of the statements was a permissible consideration in assessing reliability under the principled approach.

31 Rosenberg J.A., writing for the majority, held that the principle from *U. (F.J.)* could be applied only where the statements relate to the same event, and in most cases would be applied only where the declarant is available for cross-examination (para. 114). Here, the statements related to different incidents. Although a trier of fact might conclude, using similar fact reasoning, that the same person committed all of the crimes, this is an issue going to ultimate reliability, not threshold reliability (para. 115). Only the latter is relevant in determining admissibility. In addition, Rosenberg J.A. held that the comparator statements must also be substantively admissible, because the final decision as to the likelihood of coincidence or collusion rests with the trier of fact (para. 128), and it would be odd for the trier of fact to be assessing ultimate reliability without access to "the very piece of evidence that convinced the trial judge that the statement was reliable" (para. 130). Grossi J.'s decision, therefore, was an impermissible expansion of the principle in *U. (F.J.)*. Rosenberg J.A. also held, at para. 92, that such an expansion was inconsistent with the statement of Iacobucci J. in *Starr*, at para. 217, that "corroborating ... evidence" should not be considered in determining threshold reliability.

32 In dissent, Blair J.A. held that the central notion underpinning the *U. (F.J.)* "exception" was that absent collusion, prior knowledge, or improper influence, "striking similarities between statements belie coincidence and therefore bolster the reliability of the statement under consideration" (para. 44). While he held that the absence of cross-examination remained a factor to be weighed in assessing threshold reliability, he was of the view that its absence, in and of itself, was not an impediment to the principled application of the *U. (F.J.)* exception. He also found that the exception could apply where the statements related to different events, stating that, for the purpose of finding threshold reliability, he could see no "logical difference" between statements concerning the same accused "doing the same thing on the same occasion" and "the same accused doing the same thing on different occasions" (para. 48), drawing on the rationale for similar-fact reasoning, since both involve admitting evidence on the basis of the "improbability of coincidence" (para. 49). Finally, he found that a finding that the comparator statements are not substantively admissible should not exclude them from the reliability analysis, pointing out that otherwise reliable statements could be held inadmissible for a variety of reasons, including a finding that they were not necessary (para. 53).

33 On the basis of these conclusions, Blair J.A. held that the trial judge had not erred in considering the similarity among the statements in determining their threshold reliability. He then went on to apply "the *U. (F.J.)* exception" to the statements at issue on appeal, and held that although the videotaped statement of Mr. Dinino was inadmissible, the videotaped statement of Mr. Skupien was.

5. Rule Against Hearsay

5.1 General Exclusionary Rule

34 The basic rule of evidence is that all relevant evidence is admissible. There are a number of exceptions to this basic rule. One of the main exceptions is the rule against hearsay: absent an exception, hearsay evidence is *not* admissible. Hearsay evidence is not excluded because it is irrelevant — there is no need for a special rule to exclude irrelevant evidence. Rather, as we shall see, it is the difficulty of testing hearsay evidence that underlies the exclusionary rule and, generally, the alleviation of this difficulty that forms the basis of the exceptions to the rule. Although

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

hearsay evidence includes communications expressed by conduct, I will generally refer to hearsay statements only.

5.2 Definition of Hearsay

35 At the outset, it is important to determine what is and what is not hearsay. The difficulties in defining hearsay encountered by courts and learned authors have been canvassed before and need not be repeated here: see *R. v. Abbey*, [1982] 2 S.C.R. 24 (S.C.C.), at pp. 40-41, *per* Dickson J. It is sufficient to note, as this Court did in *Starr*, at para. 159, that the more recent definitions of hearsay are focussed on the central concern underlying the hearsay rule: the difficulty of testing the reliability of the declarant's assertion. See, for example, *R. v. O'Brien* (1977), [1978] 1 S.C.R. 591 (S.C.C.), at pp. 593-94. Our adversary system puts a premium on the calling of witnesses, who testify under oath or solemn affirmation, whose demeanour can be observed by the trier of fact, and whose testimony can be tested by cross-examination. We regard this process as the optimal way of testing testimonial evidence. Because hearsay evidence comes in a different form, it raises particular concerns. The general exclusionary rule is a recognition of the difficulty for a trier of fact to assess what weight, if any, is to be given to a statement made by a person who has not been seen or heard, and who has not been subject to the test of cross-examination. The fear is that untested hearsay evidence may be afforded more weight than it deserves. The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant. I will deal with each defining feature in turn.

5.2.1 Statements Adduced for Their Truth

36 The purpose for which the out-of-court statement is tendered matters in defining what constitutes hearsay because it is only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises. Consider the following example. At an accused's trial on a charge for impaired driving, a police officer testifies that he stopped the accused's car because he received information from an unidentified caller that the car was driven by a person who had just left a local tavern in a "very drunk" condition. If the statement about the inebriated condition of the driver is introduced for the sole purpose of establishing the police officer's grounds for stopping the vehicle, it does not matter whether the unidentified caller's statement was accurate, exaggerated, or even false. Even if the statement is totally unfounded, that fact does not take away from the officer's explanation of his actions. If, on the other hand, the statement is tendered as proof that the accused was in fact impaired, the trier of fact's inability to test the reliability of the statement raises real concerns. Hence, only in the latter circumstance is the evidence about the caller's statement defined as hearsay and subject to the general exclusionary rule.

5.2.2 Absence of Contemporaneous Cross-Examination

37 The previous example, namely where the witness tells the court what A told him, is the more obvious form of hearsay evidence. A is not before the court to be seen, heard and cross-examined. However, the traditional law of hearsay also extends to out-of-court statements made by the witness who does testify in court when that out-of-court statement is tendered to prove the truth of its contents. This extended definition of hearsay has been adopted in Canada: *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.), at pp. 763-64; *Starr*, at para. 158. It is important to understand the rationale for treating a witness's out-of-court statements as hearsay.

38 When the witness repeats or adopts an earlier out-of-court statement, in court, under oath or solemn affirmation, of course no hearsay issue arises. The statement itself is not evidence, the testimony is the evidence and it can be tested in the usual way by observing the witness and subjecting him or her to cross-examination. The hearsay issue does arise, however, when the witness does not repeat or adopt the information contained in the out-of-court statement and the statement itself is tendered for the truth of its contents. Consider the following example to illustrate the concerns raised by this evidence.

39 In an out-of-court statement, W identifies the accused as her assailant. At the trial of the accused on a charge of

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

assault, W testifies that the accused is *not* her assailant. The Crown seeks to tender the out-of-court statement as proof of the fact that the accused did assault W. In these circumstances, the trier of fact is asked to accept the out-of-court statement over the sworn testimony of the witness. Given the usual premium placed on the value of in-court testimonial evidence, a serious issue arises as to whether it is at all necessary to introduce the statement. In addition, the reliability of that statement becomes crucial. How trustworthy is it? In what circumstances did W make that statement? Was it made casually to friends at a social function, or rather, to the police as a formal complaint? Was W aware of the potential consequences of making that statement, did she intend that it be acted upon? Did she have a motive to lie? In what condition was W at the time she made the statement? Many more questions can come to mind on matters that relate to the reliability of that out-of-court statement. When the trier of fact is asked to consider the out-of-court statement as proof that the accused in fact assaulted W, assessing its reliability may prove to be difficult.

40 Concerns over the reliability of the statement also arise where W does not recant the out-of-court statement but testifies that she has no memory of making the statement, or worse still, no memory of the assault itself. The trier of fact does not see or hear the witness making the statement and, because there is no opportunity to cross-examine the witness *contemporaneously* with the making of the statement, there may be limited opportunity for a meaningful testing of its truth. In addition, an issue may arise as to whether the prior statement is fully and accurately reproduced.

41 Hence, although the underlying rationale for the general exclusionary rule may not be as obvious when the declarant is available to testify, it is the same — the difficulty of testing the reliability of the out-of-court statement. The difficulty of assessing W's out-of-court statement is the reason why it falls within the definition of hearsay and is subject to the general exclusionary rule. As one may readily appreciate, however, the degree of difficulty may be substantially alleviated in cases where the declarant is available for cross-examination on the earlier statement, particularly where an accurate record of the statement can be tendered in evidence. I will come back to that point later. My point here is simply to explain why, by definition, hearsay extends to out-of-court statements tendered for their truth even when the declarant is before the court.

5.3 Hearsay Exceptions: A Principled Approach

42 It has long been recognized that a rigid application of the exclusionary rule would result in the unwarranted loss of much valuable evidence. The hearsay statement, because of the way in which it came about, may be inherently reliable, or there may be sufficient means of testing it despite its hearsay form. Hence, a number of common law exceptions were gradually created. A rigid application of these exceptions, in turn, proved problematic leading to the needless exclusion of evidence in some cases, or its unwarranted admission in others. Wigmore urged greater flexibility in the application of the rule based on the two guiding principles that underlie the traditional common law exceptions: necessity and reliability (*Wigmore on Evidence* (2nd ed. 1923), vol. III, — 1420, at p. 153). This Court first accepted this approach in *Khan* and later recognized its primacy in *Starr*. The governing framework, based on *Starr*, was recently summarized in *R. v. Mapara*, [2005] 1 S.C.R. 358, 2005 SCC 23 (S.C.C.), at para. 15:

> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
>
> (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
>
> (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
>
> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

43 In this case, we are concerned with the admission of evidence under item (d). In particular, the courts below were divided over two main questions: (1) what factors must be considered in deciding whether the evidence is sufficiently reliable to be admitted; and (2) whether the "exception" recognized by this Court in *U. (F.J.)* can be extended to the facts of this case. I will comment first on the second question.

44 In my view, the discussion over whether the "*U. (F.J.)* exception" applies here exemplifies the concern expressed in *U. (F.J.)* itself, that the "new approach to hearsay does not itself become a rigid pigeon-holing analysis" (para. 35). In *U. (F.J.)*, there was a similar debate over whether the "*B. (K.G.)* exception" to the rule against the substantive admission of prior inconsistent statements extended to circumstances where the reliability of the complainant's statement was based, not so much on the circumstances in which it came about as was the case in *B. (K.G.)*, but on its striking similarity to a statement made by the accused. Lamer C.J. explained how his decision in *B. (K.G.)* was an application of the principled approach to hearsay, and how "[i]n addition ... a threshold of reliability can sometimes be established, in cases where the witness is available for cross-examination, by a striking similarity between two statements" (para. 40). He concluded his analysis by anticipating that yet other situations may arise. He stated the following (at para. 45):

> I anticipate that instances of statements so strikingly similar as to bolster their reliability will be rare. In keeping with our principled and flexible approach to hearsay, other situations may arise where prior inconsistent statements will be judged substantively admissible, bearing in mind that cross-examination alone provides significant indications of reliability. It is not necessary in this case to decide if cross-examination alone provides an adequate assurance of threshold reliability to allow substantive admission of prior inconsistent statements.

45 As I will discuss later, both *B. (K.G.)* and *U. (F.J.)* highlight the particular concerns raised in cases of prior inconsistent statements. However, following Lamer C.J.'s own words of caution against "rigid pigeon-holing analysis", it is my view that neither *B. (K.G.)* nor *U. (F.J.)* should be interpreted as creating categorical exceptions to the rule against hearsay based on fixed criteria. The majority judgment in *B. (K.G.)* itself leaves room for appropriate substitutes for the criteria it sets out. Further, to interpret these cases as creating new categories of exceptions would not be in keeping with the flexible case-by-case principled approach. We would simply be replacing the traditional set of exceptions with a new and (for the time being) less ossified one. Rather, these cases provide guidance — not fixed categories — on the application of the principled case-by-case approach by identifying the relevant concerns and the factors to be considered in determining admissibility.

46 I will review *B. (K.G.)* and *U. (F.J.)* in this light as well as some other relevant decisions from this Court. Since the issues raised on this appeal relate to the assessment of reliability, my analysis will be focussed on that criterion. However, as I will explain, necessity and reliability should not be considered in isolation. One criterion may impact on the other. For example, as we shall see, in some cases the need for the evidence may, in large part, be based on the fact that the hearsay statement is highly reliable and the fact-finding process would be distorted without it. However, before I discuss the factors relating to reliability, I want to say a word on the overarching principle of trial fairness.

5.4 Constitutional Dimension: Trial Fairness

47 Prior to admitting hearsay statements under the principled exception to the hearsay rule, the trial judge must determine on a *voir dire* that necessity and reliability have been established. The onus is on the person who seeks to adduce the evidence to establish these criteria on a balance of probabilities. In a criminal context, the inquiry may take on a constitutional dimension, because difficulties in testing the evidence, or conversely the inability to present reliable evidence, may impact on an accused's ability to make full answer and defence, a right protected by s. 7 of the *Canadian Charter of Rights and Freedoms*: *R. v. Dersch*, [1990] 2 S.C.R. 1505 (S.C.C.). The right to make full answer and defence in turn is linked to another principle of fundamental justice, the right to a fair trial: *R. v. Rose*, [1998] 3 S.C.R. 262 (S.C.C.). The concern over trial fairness is one of the paramount reasons for rationalizing the traditional

hearsay exceptions in accordance with the principled approach. As stated by Iacobucci J. in *Starr*, at para. 200, in respect of Crown evidence: "It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception."

48 As indicated earlier, our adversary system is based on the assumption that sources of untrustworthiness or inaccuracy can best be brought to light under the test of cross-examination. It is mainly because of the inability to put hearsay evidence to that test, that it is presumptively inadmissible. However, the constitutional right guaranteed under s. 7 of the *Charter* is not the right to confront or cross-examine adverse witnesses in itself. The adversarial trial process, which includes cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved. Trial fairness embraces more than the rights of the accused. While it undoubtedly includes the right to make full answer and defence, the fairness of the trial must also be assessed in the light of broader societal concerns: see *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), at paras. 69-76. In the context of an admissibility inquiry, society's interest in having the trial process arrive at the truth is one such concern.

49 The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. As we shall see, the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other. In some cases, because of the circumstances in which it came about, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. In other cases, the evidence may not be so cogent but the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect.

6. The Admissibility Inquiry

6.1 Distinction Between Threshold and Ultimate Reliability: A Source of Confusion

50 As stated earlier, the trial judge only decides whether hearsay evidence is admissible. Whether the hearsay statement will or will not be ultimately relied upon in deciding the issues in the case is a matter for the trier of fact to determine at the conclusion of the trial based on a consideration of the statement in the context of the entirety of the evidence. It is important that the trier of fact's domain not be encroached upon at the admissibility stage. If the trial is before a judge and jury, it is crucial that questions of ultimate reliability be left for the jury — in a criminal trial, it is constitutionally imperative. If the judge sits without a jury, it is equally important that he or she not prejudge the ultimate reliability of the evidence before having heard all of the evidence in the case. Hence, a distinction must be made between "ultimate reliability" and "threshold reliability". Only the latter is inquired into on the admissibility *voir dire*.

51 The distinction between threshold and ultimate reliability has been made in a number of cases (see, for example, *B. (K.G.)* and *R. v. Hawkins*, [1996] 3 S.C.R. 1043 (S.C.C.)), but we are mainly concerned here with the elaboration of this principle in *Starr*. In particular, the following excerpt from the Court's analysis has been the subject of much of the discussion and commentary (at paras. 215 and 217):

> In this connection, it is important when examining the reliability of a statement under the principled approach to

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

> distinguish between threshold and ultimate reliability. Only the former is relevant to admissibility: see *Hawkins*, *supra*, at p. 1084. Again, it is not appropriate in the circumstances of this appeal to provide an exhaustive catalogue of the factors that may influence threshold reliability. However, our jurisprudence does provide some guidance on this subject. Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide *circumstantial* guarantees of trustworthiness. This could be because the declarant had no motive to lie (see *Khan*, *supra*; *Smith*, *supra*), or because there were safeguards in place such that a lie could be discovered (see *Hawkins*, *supra*; *U. (F.J.)*, *supra*; *B. (K.G.)*, *supra*).
>
> . . . . .
>
> At the stage of hearsay admissibility the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; see also *Idaho v. Wright*, 497 U.S. 805(1990). In summary, under the principled approach a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable. However, it will need to examine whether the circumstances in which the statement was made lend sufficient credibility to allow a finding of threshold reliability.
>
> [Underlining added.]

52 The Court's statement that "threshold reliability is concerned not with whether the statement is true or not" has created some uncertainty. While it is clear that the trial judge does not determine whether the statement will ultimately be relied upon as true, it is not so clear that in every case threshold reliability is *not* concerned with whether the statement is true or not. Indeed, in *U. (F.J.)*, the rationale for admitting the complainant's hearsay statement was based on the fact that "the only likely explanation" for its striking similarity with the independent statement of the accused was that "they were both telling the truth" (para. 40).

53 Further, it is not easy to discern what is or is not a circumstance "surrounding the statement itself". For example, in *Smith*, the fact that the deceased may have had a motive to lie was considered by the Court in determining threshold admissibility. As both Rosenberg J.A. and Blair J.A. point out in their respective reasons, "in determining whether the declarant had a motive to lie, the judge will necessarily be driven to consider factors outside the statement itself or the immediately surrounding circumstances" (para. 97).

54 Much of the confusion in this area of the law has arisen from this attempt to categorically label some factors as going only to ultimate reliability. The bar against considering "corroborating or conflicting evidence", because it is only relevant to the question of ultimate reliability, is a further example. Quite clearly, the corroborative nature of the semen stain in *Khan* played an important part in establishing the threshold reliability of the child's hearsay statement in that case.

55 This part of the analysis in *Starr* therefore requires clarification and, in some respects, reconsideration. I will explain how the relevant factors to be considered on an admissibility inquiry cannot invariably be categorized as relating either to threshold or ultimate reliability. Rather, the relevance of any particular factor will depend on the particular dangers arising from the hearsay nature of the statement and the available means, if any, of overcoming them. I will then return to the impugned passage in *Starr*, dealing more specifically with the question of supporting evidence since that reference appears to have raised the most controversy.

6.2 Identifying the Relevant Factors: A Functional Approach

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

6.2.1 Recognizing Hearsay

56 The first matter to determine before embarking on a hearsay admissibility inquiry, of course, is whether the proposed evidence is hearsay. This may seem to be a rather obvious matter, but it is an important first step. Misguided objections to the admissibility of an out-of-court statement based on a misunderstanding of what constitutes hearsay are not uncommon. As discussed earlier, not all out-of-court statements will constitute hearsay. Recall the defining features of hearsay. An out-of-court statement will be hearsay when: (1) it is adduced to prove the truth of its contents *and* (2) there is no opportunity for a contemporaneous cross-examination of the declarant.

57 Putting one's mind to the defining features of hearsay at the outset serves to better focus the admissibility inquiry. As we have seen, the first identifying feature of hearsay calls for an inquiry into the purpose for which it is adduced. Only when the evidence is being tendered for its truth will it constitute hearsay. The fact that the out-of-court statement is adduced for its *truth* should be considered in the context of the issues in the case so that the court may better assess the potential impact of introducing the evidence in its hearsay form.

58 Second, by putting one's mind, at the outset, to the second defining feature of hearsay — the absence of an opportunity for contemporaneous cross-examination of the declarant, the admissibility inquiry is immediately focussed on the dangers of admitting hearsay evidence. Iacobucci J. in *Starr* identified the inability to test the evidence as the "central concern" underlying the hearsay rule. Lamer C.J. in *U. (F.J.)* expressed the same view but put it more directly by stating: "Hearsay is inadmissible as evidence because its reliability cannot be tested" (para. 22).

6.2.2 Presumptive Inadmissibility of Hearsay Evidence

59 Once the proposed evidence is identified as hearsay, it is presumptively *inadmissible*. I stress the nature of the hearsay rule as a general exclusionary rule because the increased flexibility introduced in the Canadian law of evidence in the past few decades has sometimes tended to blur the distinction between admissibility and weight. Modifications have been made to a number of rules, including the rule against hearsay, to bring them up to date and to ensure that they facilitate rather than impede the goals of truth seeking, judicial efficiency and fairness in the adversarial process. However, the traditional rules of evidence reflect considerable wisdom and judicial experience. The modern approach has built upon their underlying rationale, not discarded it. In *Starr* itself, where this Court recognized the primacy of the principled approach to hearsay exceptions, the presumptive exclusion of hearsay evidence was reaffirmed in strong terms. Iacobucci J. stated as follows (at para. 199):

> By excluding evidence that might produce unfair verdicts, and by ensuring that litigants will generally have the opportunity to confront adverse witnesses, the hearsay rule serves as a cornerstone of a fair justice system.

6.2.3 Traditional Exceptions

60 The Court in *Starr* also reaffirmed the continuing relevance of the traditional exceptions to the hearsay rule. More recently, this Court in *Mapara* reiterated the continued application of the traditional exceptions in setting out the governing analytical framework, as noted in para. 42 above. Therefore, if the trial judge determines that the evidence falls within one of the traditional common law exceptions, this finding is conclusive and the evidence is ruled admissible, unless, in a rare case, the exception itself is challenged as described in both those decisions.

6.2.4 Principled Approach: Overcoming the Hearsay Dangers

61 Since the central underlying concern is the inability to test hearsay evidence, it follows that under the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. As some courts and commentators have expressly noted, the reliability requirement is usually met in two different ways: see, for example,

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

R. v. Wilcox (2001), 152 C.C.C. (3d) 157, 2001 NSCA 45 (N.S. C.A.); *R. v. Czibulka* (2004), 189 C.C.C. (3d) 199 (Ont. C.A.); D. M. Paciocco, "The Hearsay Exceptions: A Game of 'Rock, Paper, Scissors'", in *Special Lectures of the Law Society of Upper Canada 2003: The Law of Evidence* (2004), 17, at p. 29.

62 One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form. Wigmore explained it this way:

> There are many situations in which it can be easily seen that such a required test [i.e., cross-examination] would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. [§1420, p. 154]

63 Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested. Recall that the optimal way of testing evidence adopted by our adversarial system is to have the declarant state the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination. This preferred method is not just a vestige of past traditions. It remains a tried and true method, particularly when credibility issues must be resolved. It is one thing for a person to make a damaging statement about another in a context where it may not really matter. It is quite another for that person to repeat the statement in the course of formal proceedings where he or she must commit to its truth and accuracy, be observed and heard, and be called upon to explain or defend it. The latter situation, in addition to providing an accurate record of what was actually said by the witness, gives us a much higher degree of comfort in the statement's trustworthiness. However, in some cases it is not possible to put the evidence to the optimal test, but the circumstances are such that the trier of fact will nonetheless be able to sufficiently test its truth and accuracy. Again, common sense tells us that we should not lose the benefit of the evidence when there are adequate substitutes for testing the evidence.

64 These two principal ways of satisfying the reliability requirement can also be discerned in respect of the traditional exceptions to the hearsay rule. Iacobucci J. notes this distinction in *Starr*, stating as follows:

> For example, testimony in former proceedings is admitted, at least in part, because many of the traditional dangers associated with hearsay are not present. As pointed out in Sopinka, Lederman and Bryant, *supra*, at pp. 278-79:
>
> > ... a statement which was earlier made under oath, subjected to cross-examination and admitted as testimony at a former proceeding is received in a subsequent trial *because the dangers underlying hearsay evidence are absent.*
>
> Other exceptions are based not on negating traditional hearsay dangers, but on the fact that the statement provides circumstantial guarantees of reliability. This approach is embodied in recognized exceptions such as dying declarations, spontaneous utterances, and statements against pecuniary interest.
>
> [Emphasis in original; para. 212.]

65 Some of the traditional exceptions stand on a different footing, such as admissions from parties (confessions in the criminal context) and co-conspirators' statements: see *Mapara*, at para. 21. In those cases, concerns about reliability are based on considerations other than the party's inability to test the accuracy of his or her own statement or that of his or her co-conspirators. Hence, the criteria for admissibility are not established in the same way. However, in cases where the exclusionary rule is based on the usual hearsay dangers, this distinction between the two principal

ways of satisfying the reliability requirement, although not by any means one that creates mutually exclusive categories, may assist in identifying what factors need to be considered on the admissibility inquiry.

66 *Khan* is an example where the reliability requirement was met because the circumstances in which the statement came about provided sufficient comfort in its truth and accuracy. Similarly in *Smith*, the focus of the admissibility inquiry was also on those circumstances that tended to show that the statement was true. On the other hand, the admissibility of the hearsay statement in *B. (K.G.)* and *Hawkins* was based on the presence of adequate substitutes for testing the evidence. As we shall see, the availability of the declarant for cross-examination goes a long way to satisfying the requirement for adequate substitutes. In *U. (F.J.)*, the Court considered both those circumstances tending to show that the statement was true and the presence of adequate substitutes for testing the evidence. *R. v. U. (F.J.)* underscores the heightened concern over reliability in the case of prior inconsistent statements where the trier of fact is invited to accept an out-of-court statement over the sworn testimony from the same declarant. I will briefly review how the analysis of the Court in each of those cases was focussed on overcoming the particular hearsay dangers raised by the evidence.

6.2.4.1 *R. v. Khan*, [1990] 2 S.C.R. 531 (S.C.C.)

67 As stated earlier, *Khan* is an example where the reliability requirement was met because the circumstances in which the statement came about provided sufficient comfort in its truth and accuracy. The facts are well known. *Khan* involved a sexual assault on a very young child by her doctor. The child was incompetent to testify. The child's statements to her mother about the incident were inadmissible under any of the traditional hearsay exceptions. However, the child's statement had several characteristics that suggested the statement was true. Those characteristics answered many of the concerns that one would expect would be inquired into in testing the evidence, had it been available for presentation in open court in the usual way. McLachlin J., in the following oft-quoted statement, summarized them in this way:

> I conclude that the mother's statement in the case at bar should have been received. It was necessary, the child's viva voce evidence having been rejected. It was also reliable. The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence. [p. 548]

The facts also revealed that the statement was made almost immediately after the event. That feature removed any concern about inaccurate memory. The fact that the child had no reason to lie alleviated the concern about sincerity. Because the statement was made naturally and without prompting, there was no real danger that it came about because of the mother's influence. Most importantly, as stated in the above excerpt, the event described was one that would ordinarily be outside the experience of a child of her age giving it a "peculiar stamp of reliability". Finally, the statement was confirmed by a semen stain on the child's clothing. These characteristics each went to the truth and accuracy of the statement and, taken together, amply justified its admission. The criterion of reliability was met. There is nothing controversial about the factors considered in *R. v. Khan*, except for the supportive evidence of the semen stain. I will come back to that point later.

6.2.4.2 *R. v. Smith*, [1992] 2 S.C.R. 915 (S.C.C.)

68 In *Smith*, this Court's inquiry into the circumstantial guarantees of reliability was also focussed on those circumstances that tended to show that the statement was true.

69 Smith was charged with the murder of K. The Crown's evidence included the testimony of K's mother about four telephone calls K made to her on the night of the murder. Defence counsel did not object to this evidence. Smith was convicted at trial. The Court of Appeal allowed the appeal and ordered a new trial on the ground that the phone

calls were hearsay, and only the first two were admissible for the purpose of establishing K's state of mind. In refusing to apply the curative proviso, the Court of Appeal found that the hearsay had been used to place Smith with K at the time of her death, thereby "buttressing certain identification evidence of questionable reliability" (pp. 922-23). The Crown appealed to this Court.

70 After ruling that the state of mind, or "present intentions" exception did not apply to the phone calls, Lamer C.J. went on to elaborate on and then apply the approach outlined in *R. v. Khan*. After quoting extensively from Wigmore on the underlying rationale for the hearsay rule and its exceptions, he elaborated on the reliability prong of the principled analysis and stated as follows (at p. 933):

> If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established.
>
> [Emphasis added.]

71 In determining whether the phone calls were reliable, Lamer C.J. held that the first two were, but the third was not (the fourth was not in issue on appeal to this Court). With respect to the first two, there was no reason to doubt K's veracity — "[s]he had no known reason to lie" — and the traditional dangers associated with hearsay — perception, memory and credibility — "were not present to any significant degree" (p. 935). As we can see, the Court looked at factors that would likely have been inquired into during the course of cross-examination if the declarant had been available to testify and found that these usual concerns were largely alleviated because of the way in which the statements came about. Hence, the Court concluded that the absence of the ability to cross-examine K should go to the weight given to this evidence, not its admissibility.

72 With respect to the third phone call, however, Lamer C.J. held that "the conditions under which the statement was made do not ... provide that circumstantial guarantee of trustworthiness that would justify its admission without the possibility of cross-examination" (p. 935). First, he held that she may have been mistaken about Smith returning to the hotel, or about his purpose in returning (p. 936). Second, he held that she might have lied to prevent her mother from sending another man to pick her up. With respect to this second possibility, Lamer C.J. held that the fact that K had been travelling under an assumed name with a credit card which she knew was either stolen or forged demonstrated that she was "at least capable of deceit" (p. 936). Again, the Court looked at factors that would likely have been inquired into during the course of cross-examination if the declarant had been available to testify and concluded that these "hypotheses" showed that the circumstances of the statement were not such as to "justify the admission of its contents" since it was impossible to say that the evidence was unlikely to change under cross-examination (p. 937). It is important to note that the Court did not go on to determine whether, on its view of the evidence, the declarant was mistaken or whether she had lied — those would be matters for the ultimate trier of fact to decide. On the admissibility inquiry, it sufficed that the circumstances in which the statement was made gave rise to these issues to bar its admission.

6.2.4.3 *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.)

73 *B. (K.G.)* provides an example where threshold reliability was essentially based on the presence of adequate substitutes for the traditional safeguards relied upon to test the evidence.

74 The issue in *B. (K.G.)* was the substantive admissibility of prior inconsistent statements made by three of B's friends, in which they told the police that B was responsible for stabbing and killing the victim in the course of a fight. The three recanted their statements at trial. (They subsequently plead guilty to perjury.) The Crown sought to admit the prior statements to police for the truth of their contents. Although the trial judge had no doubt the recantations were false, he followed the traditional common law ("orthodox") rule that the statements could be used only to impeach the

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

witnesses. In light of the doubtfulness of the other identification evidence, the trial judge acquitted B.

75 The issue before this Court was whether the orthodox rule in respect of prior inconsistent statements should be maintained. In reviewing its history, Lamer C.J. noted that, although the prohibition on hearsay was not always recognized as the basis for the rule, similar "dangers" were cited as reasons against admission, namely absence of an oath or affirmation, inability of the trier of fact to assess demeanour, and lack of contemporaneous cross-examination (pp. 763-64). After reviewing the academic criticism, the views of law reform commissioners, legislative changes in Canada and elsewhere, and developments in the law of hearsay, Lamer C.J. concluded that it was the province and duty of the Court to formulate a new rule (p. 777). He held that "evidence of prior inconsistent statements of a witness other than an accused should be substantively admissible on a principled basis, following this Court's decisions in *Khan* and *Smith*" with the requirements of reliability and necessity "adapted and refined in this particular context, given the particular problems raised by the nature of such statements" (p. 783).

76 The most important contextual factor in *B. (K.G.)* is the availability of the declarant. Unlike the situation in *Khan* or *Smith*, the trier of fact is in a much better position to assess the reliability of the evidence because the declarant is available to be cross-examined on his or her prior inconsistent statement. The admissibility inquiry into threshold reliability, therefore, is not so focussed on the question whether there is reason to believe the statement is true, as it is on the question whether the trier of fact will be in a position to rationally evaluate the evidence. The search is for adequate substitutes for the process that would have been available had the evidence been presented in the usual way, namely through the witness, under oath or affirmation, and subject to the scrutiny of contemporaneous cross-examination.

77 Since the declarant testifies in court, under oath or affirmation, and is available for cross-examination, the question becomes why there is any remaining concern over the reliability of the prior statement. As I have indicated earlier, necessity and reliability should not be considered in isolation. One criterion may have an impact on the other. The situation in *B. (K.G.)* is one example. As noted by Lamer C.J., "[p]rior inconsistent statements present vexing problems for the necessity criterion" (p. 796). Indeed, the declarant is available as a witness. Why should not the usual rule apply and the recanting witness's sworn testimony alone go to the truth of the matter? After all, is that not the optimal test on reliability — that the witness come forth to be seen and heard, swear or affirm to tell the truth in the formal context of court proceedings, and be subjected to cross-examination? If a witness recants a prior statement and denies its truth, the default position is to conclude that the trial process has worked as intended — untruthful or inaccurate information will have been weeded out. There must be good reason to present the prior inconsistent statement as substantive proof over the sworn testimony given in court.

78 As we know, the Court ultimately ruled in *B. (K.G.)*, and the principle is now well established, that necessity is not to be equated with the unavailability of the witness. The necessity criterion is given a flexible definition. In some cases, such as in *B. (K.G.)* where a witness recants an earlier statement, necessity is based on the unavailability of the *testimony*, not the witness. Notwithstanding the fact that the necessity criterion can be met on varied bases, the context giving rise to the need for the evidence in its hearsay form may well impact on the *degree* of reliability required to justify its admission. As stated by Lamer C.J. in *R. v. B. (K.G.)*, where the hearsay evidence is a prior inconsistent statement, reliability is a "key concern" (at pp. 786-87):

> The reliability concern is sharpened in the case of prior inconsistent statements because the trier of fact is asked to choose between two statements from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered. In other words, the focus of the inquiry in the case of prior inconsistent statements is on the comparative reliability of the prior statement and the testimony offered at trial, and so additional indicia and guarantees of reliability to those outlined in *Khan* and *Smith* must be secured in order to bring the prior statement to a comparable standard of reliability before such statements are admitted as substantive evidence.

79 Lamer C.J. went on to describe the general attributes of in-court testimony that provide the usual safeguards for

reliability. He reviewed at some length the compelling reasons to prefer statements made under oath or affirmation, the value of seeing and hearing the witness in assessing credibility, the importance of having an accurate record of what was actually said, and the value of contemporaneous cross-examination. In considering what would constitute an adequate substitute in respect of the prior inconsistent statement, he concluded (at pp. 795-96) that there will be "sufficient circumstantial guarantees of reliability" to render such statements substantively admissible where

> (i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party ... has a full opportunity to cross-examine the witness respecting the statement ... Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability in place of those which the hearsay rule traditionally requires.

80 To say that a statement is sufficiently reliable because it is made under oath, in person, and the maker is cross-examined is somewhat of a misnomer. A lot of courtroom testimony proves to be totally unreliable. However, therein lies the safeguard — in the *process* that has uncovered its untrustworthiness. Hence, the presence of adequate substitutes for that process establishes a threshold of reliability and makes it safe to admit the evidence.

81 Lamer C.J. also added an important proviso, to which I will return later, on the trial judge's discretion to refuse to allow the jury to make substantive use of the statement, even where the criteria outlined above are satisfied when there is any concern that the statement may be the product of some form of investigatory misconduct (p. 801). Here, although the statements were videotaped, and the witnesses were cross-examined, the statements were not made under oath. Whether there was a sufficient substitute to warrant substantive admission was sent back to be determined by the trial judge (p. 805). The appeal was allowed and a new trial ordered. Cory J. (L'Heureux-Dubé J. concurring) agreed with the result but for different reasons that, for the purpose of our analysis, need not be reviewed here.

6.2.4.4 *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764 (S.C.C.)

82 *U. (F.J.)* brought back to the Court the issue of admissibility of prior inconsistent statements. In an interview with police, the complainant, J.U., told the interviewing officer that the accused, her father, was having sex with her "almost every day" (para. 4). She gave considerable details about the sexual activity and also described two physical assaults. The interviewing police officer later testified that he had attempted to tape the interview, but that the tape recorder had malfunctioned. He subsequently prepared a summary, based partly on notes and partly on his memory.

83 Immediately after interviewing J.U., the same officer interviewed the accused. Again, the interview was not taped. The accused admitted to having sex with J.U. "many times", describing similar sexual acts and the two physical assaults that J.U. had described (para. 5). At trial, J.U. recanted the allegations of sexual abuse. She claimed to have lied at the behest of her grandmother. The accused denied having told police that he had engaged in sexual activity with J.U.

84 The focus of the discussion before this Court was whether the "rule" in *B. (K.G.)* applied to this case. Although the criteria in *B. (K.G.)* were based on the principled approach in *Khan* and *Smith*, it was not clear whether *B. (K.G.)* established a distinct "rule" for admitting prior inconsistent statements. Lamer C.J. sought to clarify the relationship between these cases, stating as follows (at para. 35):

> *Khan* and *Smith* establish that hearsay evidence will be substantively admissible when it is necessary and sufficiently reliable. Those cases also state that both necessity and reliability must be interpreted flexibly, taking account of the circumstances of the case and ensuring that our new approach to hearsay does not itself become a rigid pigeon-holing analysis. My decision in *B. (K.G.)* is an application of those principles to a particular branch of the hearsay rule, the rule against the substantive admission of prior inconsistent statements. The primary dis-

> tinction between *B. (K.G.)*, on the one hand, and *Khan* and *Smith*, on the other, is that in *B. (K.G.)* the declarant is available for cross-examination. This fact alone goes part of the way to ensuring that the reliability criterion for admissibility is met. The case at bar differs from *B. (K.G.)* only in terms of available indicia of reliability. Necessity is met here in the same way it was met in *B. (K.G.)*: the prior statement is necessary because evidence of the same quality cannot be obtained at trial. For that reason, assessing the reliability of the prior inconsistent statement at issue here is determinative.

85 Lamer C.J. went on to determine how the indicia of reliability could be founded on different criteria than those set out in *B. (K.G.)*. The complainant's statement to the police was not made under oath. Nor was it videotaped. Most importantly, however, the declarant was available for cross-examination, thereby significantly alleviating the usual dangers arising from the introduction of hearsay evidence. Yet, the same concerns about the reliability of the prior inconsistent statement arose in this case. The complainant had recanted her earlier allegations. In the usual course of the trial process, this should be the end of the matter. Consider, for example, if the complainant had made the earlier allegations about being sexually assaulted by her father to some girlfriends in the context of playing a game of "Truth or Dare" where each player was being encouraged to outdo the previous one by saying or doing something outrageous. It would be difficult to find justification for introducing her casual statement as substantive proof over her sworn testimony that the events never happened. Hence, the focus must turn on the reliability of the prior inconsistent statement.

86 In *B. (K.G.)*, the Court held that a prior inconsistent statement is sufficiently reliable for substantive admission if it is made in circumstances comparable to the giving of in-court testimony. In *R. v. U. (F.J.)*, the reliability requirement was met rather by showing that there was no real concern about whether the complainant was speaking the truth in her statement to the police. The striking similarities between her statement and the independent statement made by her father were so compelling that the only likely explanation was that they were both telling the truth. Again here, the criteria of necessity and reliability intersect. In the interest of seeking the truth, the very high reliability of the statement rendered its substantive admission necessary.

87 Again here, Lamer C.J. added the following proviso (at para. 49):

> I would also highlight here the proviso I specified in *B. (K.G.)* that the trial judge must be satisfied on the balance of probabilities that the statement was not the product of coercion of any form, whether involving threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other forms of investigatory misconduct.

6.2.4.5 R. v. Hawkins, [1996] 3 S.C.R. 1043 (S.C.C.)

88 This Court's decision in *Hawkins* was concerned mainly with the issue of spousal incompetency. However, it is also instructive on the application of the principled approach to the hearsay rule. My remarks here are confined to the latter aspect of the case. It exemplifies how, in some circumstances, the reliability requirement may be established solely by the presence of adequate substitutes for the safeguards traditionally relied upon to test trial testimony. As we shall see, again here, the opportunity to cross-examine the declarant was a crucial factor. Because there were sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement, the Court concluded that the trial judge erred in excluding the statement based on its perceived lack of probative value.

89 Hawkins, a police officer, was charged with obstructing justice and corruptly accepting money. His then girlfriend, G, testified at his preliminary inquiry. After testifying the first time, G brought an application to testify again and recanted much of what she had said, with explanations. By the time of the trial, Hawkins and G were married and therefore G was incompetent to testify under s. 4 of the *Canada Evidence Act*. After ruling that the common law rule of spousal incompetency applied, and that G's testimony at the preliminary inquiry could not be read in at trial under s. 715 of the *Criminal Code*, the trial judge held that the evidence was not admissible under the principled

approach because it was not sufficiently reliable. Hawkins was acquitted. The verdict was overturned by majority decision of the Court of Appeal for Ontario. On further appeal to this Court, the appeal was dismissed but for different reasons. This Court refused to modify the common law rule of spousal incompetency as it was invited to do. The Court agreed with the trial judge that the common law rule applied, and the testimony could not be read in under s. 715. However, a majority of the Court held that the preliminary inquiry testimony could be read in at trial under the principled approach to the admission of hearsay. The three dissenting judges held that this violated the policy underlying s. 4 and should not be permitted.

90 After determining that the necessity criterion was met, Lamer C.J. and Iacobucci J. (Gonthier and Cory JJ. concurring) addressed reliability. In the circumstances of this case, it could hardly be said that the complainant's testimony was inherently trustworthy. She had given contradictory versions, all under oath. Rather, the Court looked for the presence of a satisfactory basis for evaluating the truth of the statement, stating as follows, at para. 75:

> The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. More specifically, the judge must identify the specific hearsay dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers. The ultimate reliability of the statement, and the weight to be attached to it, remain determinations for the trier of fact.
>
> [Emphasis added.]

91 The Court held that, generally, a witness's testimony before a preliminary inquiry will satisfy the test for threshold reliability, since the fact that it was given under oath and subject to contemporaneous cross-examination in a hearing involving the same parties and mainly the same issues will provide sufficient guarantees of its trustworthiness (para. 76). In addition, the accuracy of the statement is certified by a written transcript which is signed by the judge, and the party against whom the hearsay evidence is tendered has the power to call the declarant as a witness. The inability of the trier of fact to observe demeanour was found to be "more than compensated by the circumstantial guarantees of trustworthiness inherent in the adversarial, adjudicative process of a preliminary inquiry" (para. 77). The fact that the early common law was prepared to admit former testimony under certain circumstances indicated an implicit acceptance of its reliability notwithstanding the lack of the declarant's presence (para. 78). Therefore, Lamer C.J. and Iacobucci J. concluded (at para. 79):

> For these reasons, we find that a witness's recorded testimony before a preliminary inquiry bears sufficient hallmarks of trustworthiness to permit the trier of fact to make substantive use of such statements at trial. The surrounding circumstances of such testimony, particularly the presence of an oath or affirmation and the opportunity for contemporaneous cross-examination, more than adequately compensate for the trier of fact's inability to observe the demeanour of the witness in court. The absence of the witness at trial goes to the weight of such testimony, not to its admissibility.

Applying this reasoning to the statement at issue, it was found to be reliable (para. 80).

92 Lamer C.J. and Iacobucci J. added that the trial judge had erred in considering the internal contradictions contained in the testimony because these considerations properly related to the ultimate assessment of the actual probative value of the testimony, a matter for the trier of fact. Although some of the analysis on this last point is couched in terms of categorizing factors as relevant to either threshold or ultimate reliability, an approach which should no longer be adopted, the Court's conclusion on this point exemplifies where the line should be drawn on an inquiry into threshold reliability. When the reliability requirement is met on the basis that the trier of fact has a sufficient basis to assess the statement's truth and accuracy, there is no need to inquire further into the likely truth of the

statement. That question becomes one that is entirely left to the ultimate trier of fact and the trial judge is exceeding his or her role by inquiring into the likely truth of the statement. When reliability is dependent on the inherent trustworthiness of the statement, the trial judge must inquire into those factors tending to show that the statement is true or not — recall *U. (F.J.)*.

6.3 Revisiting paras. 215 and 217 in Starr

93 As I trust it has become apparent from the preceding discussion, whether certain factors will go only to ultimate reliability will depend on the context. Hence, some of the comments at paras. 215 and 217 in *Starr* should no longer be followed. Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach as discussed above and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers. In addition, the trial judge must remain mindful of the limited role that he or she plays in determining admissibility — it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire*.

94 I want to say a few words on one factor identified in *Starr*, namely "the presence of corroborating or conflicting evidence" since it is that comment that appears to have raised the most controversy. I repeat it here for convenience:

> Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in *R. v. C. (B.)* (1993), 12 O.R. (3d) 608; see also *Idaho v. Wright*, 497 U.S. 805(1990). [para. 217]

95 I will briefly review the two cases relied upon in support of this statement. The first does not really provide assistance on this question and the second, in my respectful view, should not be followed.

96 In *R. v. C. (B.)* (1993), 12 O.R. (3d) 608 (Ont. C.A.), the trial judge, in convicting the accused, had used a co-accused's statement as evidence in support of the complainant's testimony. The Court of Appeal held that this constituted an error. While a statement made by a co-accused was admissible for its truth against the co-accused, it remained hearsay as against the accused. The co-accused had recanted his statement at trial. His statement was not shown to be reliable so as to be admitted as an exception to the hearsay rule against the accused. Therefore, this case is of no assistance on the question of whether supporting evidence should be considered or not in determining hearsay admissibility. It simply reaffirms the well-established rule that an accused's statement is only admissible against its maker, not the co-accused.

97 *Idaho v. Wright*, 497 U.S. 805 (U.S. Sup. Ct. 1990), is more on point. In that case, five of the nine justices of the United States Supreme Court were not persuaded that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness'" (p. 822). In the majority's view, the use of corroborating evidence for that purpose "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility" (p. 823). By way of example, the majority observed that a statement made under duress may happen to be true, but evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial. The majority also raised the concern, arising mostly in child sexual abuse cases, that a jury may rely on the partial corroboration provided by medical evidence to mistakenly infer the trustworthiness of the entire allegation.

98 In his dissenting opinion, Kennedy J., with whom the remaining three justices concurred, strongly disagreed with the position of the majority on the potential use of supporting or conflicting evidence. In my view, his reasons echo much of the criticism that has been voiced about this Court's position in *Starr*. He said the following:

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

> I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable. It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. In the context of child abuse, for example, if part of the child's hearsay statement is that the assailant tied her wrists or had a scar on his lower abdomen, and there is physical evidence or testimony to corroborate the child's statement, evidence which the child could not have fabricated, we are more likely to believe that what the child says is true. Conversely, one can imagine a situation in which a child makes a statement which is spontaneous or is otherwise made under circumstances indicating that it is reliable, but which also contains undisputed factual inaccuracies so great that the credibility of the child's statements is substantially undermined. Under the Court's analysis, the statement would satisfy the requirements of the Confrontation Clause despite substantial doubt about its reliability. [pp. 828-29]

99 Kennedy J. also strongly disagreed with the majority's view that only circumstances surrounding the making of the statement should be considered:

> The [majority] does not offer any justification for barring the consideration of corroborating evidence, other than the suggestion that corroborating evidence does not bolster the "inherent trustworthiness" of the statements. But for purposes of determining the reliability of the statements, I can discern no difference between the factors that the Court believes indicate "inherent trustworthiness" and those, like corroborating evidence, that apparently do not. Even the factors endorsed by the Court will involve consideration of the very evidence the Court purports to exclude from the reliability analysis. The Court notes that one test of reliability is whether the child "use[d] ... terminology unexpected of a child of similar age." But making this determination requires consideration of the child's vocabulary skills and past opportunity, or lack thereof, to learn the terminology at issue. And, when all of the extrinsic circumstances of a case are considered, it may be shown that use of a particular word or vocabulary in fact supports the inference of prolonged contact with the defendant, who was known to use the vocabulary in question. As a further example, the Court notes that motive to fabricate is an index of reliability. But if the suspect charges that a third person concocted a false case against him and coached the child, surely it is relevant to show that the third person had no contact with the child or no opportunity to suggest false testimony. Given the contradictions inherent in the Court's test when measured against its own examples, I expect its holding will soon prove to be as unworkable as it is illogical.
>
> The short of the matter is that both the circumstances existing at the time the child makes the statements and the existence of corroborating evidence indicate, to a greater or lesser degree, whether the statements are reliable. If the Court means to suggest that the circumstances surrounding the making of a statement are the best indicators of reliability, I doubt this is so in every instance. And, if it were true in a particular case, that does not warrant ignoring other indicators of reliability such as corroborating evidence, absent some other reason for excluding it. If anything, I should think that corroborating evidence in the form of testimony or physical evidence, apart from the narrow circumstances in which the statement was made, would be a preferred means of determining a statement's reliability for purposes of the Confrontation Clause, for the simple reason that, unlike other indicators of trustworthiness, corroborating evidence can be addressed by the defendant and assessed by the trial court in an objective and critical way. [References omitted; pp. 833-34.]

100 In my view, the opinion of Kennedy J. better reflects the Canadian experience on this question. It has proven difficult and at times counterintuitive to limit the inquiry to the circumstances surrounding the making of the statement. This Court itself has not always followed this restrictive approach. Further, I do not find the majority's concern over the "bootstrapping" nature of corroborating evidence convincing. On this point, I agree with Professor Paciocco who commented on the reasoning of the majority in *Idaho v. Wright* as follows (at p. 36):

> The final rationale offered is that it would involve "bootstrapping" to admit evidence simply because it is shown by other evidence to be reliable. In fact, the "bootstrapping" label is usually reserved to circular arguments in

which a questionable piece of evidence "picks itself up by its own bootstraps" to fit within an exception. For example, a party claims it can rely on a hearsay statement because the statement was made under such pressure or involvement that the prospect of concoction can fairly be disregarded, but then relies on the contents of the hearsay statement to prove the existence of that pressure or involvement: *Ratten v. The Queen*, [1972] A.C. 378. Or, a party claims it can rely on the truth of the contents of a statement because it was a statement made by an opposing party litigant, but then relies on the contents of the statement to prove it was made by an opposing party litigant: see *R. v. Evans*, [1991] 1 S.C.R. 869. Looking to *other* evidence to confirm the reliability of evidence, the thing *Idaho v. Wright* purports to prevent, is the very antithesis of "bootstrapping".

7. Application to this Case

101 Mr. Skupien's statements to the cook, Ms. Stangrat, to the doctor and to the police constituted hearsay. The Crown sought to introduce the statements for the truth of their contents. In the context of this trial, the evidence was very important — indeed the two charges against Mr. Khelawon in respect of this complainant were entirely based on the truthfulness of the allegations contained in his statements.

102 Mr. Skupien's hearsay statements were presumptively inadmissible. None of the traditional hearsay exceptions could assist the Crown in proving its case. The evidence could only be admitted under the principled exception to the hearsay rule.

103 Mr. Skupien's death before the trial made it necessary for the Crown to resort to Mr. Skupien's evidence in its hearsay form. It was conceded throughout that the necessity requirement had been met. The case therefore turned on whether the evidence was sufficiently reliable to warrant admission.

104 Since Mr. Skupien had died before the trial, he was no longer available to be seen, heard and cross-examined in court. There was no opportunity for contemporaneous cross-examination. Nor had there been an opportunity for cross-examination at any other hearing. Although Mr. Skupien was elderly and frail at the time he made the allegations, there is no evidence that the Crown attempted to preserve his evidence by application under ss. 709 to 714 of the *Criminal Code*. He did not testify at the preliminary hearing. The record does not disclose if he had died by that time. In making these comments, I don't question the fact that it was necessary for the Crown to resort to Mr. Skupien's evidence in hearsay form. Necessity is conceded. However, in an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the evidence of the declarant in a manner that also preserves the rights of the other party. That issue is not raised here.

105 The fact remains however that the absence of any opportunity to cross-examine Mr. Skupien has a bearing on the question of reliability. The central concern arising from the hearsay nature of the evidence is the inability to test his allegations in the usual way. The evidence is not admissible unless there is a sufficient substitute basis for testing the evidence or the contents of the statement are sufficiently trustworthy.

106 Obviously, there was no case to be made here on the presence of adequate substitutes for testing the evidence. This is not a *Hawkins* situation where the difficulties presented by the unavailability of the declarant were easily overcome by the availability of the preliminary hearing transcript where there had been an opportunity to cross-examine the complainant in a hearing that dealt with essentially the same issues. Nor is this a *B. (K.G.)* situation where the presence of an oath and a video were coupled with the availability of the declarant at trial. There are no adequate substitutes here for testing the evidence. There is the police video — nothing more. The principled exception to the hearsay rule does not provide a vehicle for founding a conviction on the basis of a police statement, videotaped or otherwise, without more. In order to meet the reliability requirement in this case, the Crown could only rely on the inherent trustworthiness of the statement.

107 In my respectful view, there was no case to be made on that basis either. This was not a situation as in *Khan*

2006 CarswellOnt 7825, 2006 SCC 57, J.E. 2007-28, 42 C.R. (6th) 1, 215 C.C.C. (3d) 161, 71 W.C.B. (2d) 498, 355 N.R. 267, 274 D.L.R. (4th) 385, [2006] 2 S.C.R. 787, 220 O.A.C. 338

where the cogency of the evidence was such that, in the words of Wigmore, it would be "pedantic to insist on a test whose chief object is already secured" (§1420, at p. 154). To the contrary, much as in the case of the third statement ruled inadmissible in *Smith*, the circumstances raised a number of serious issues such that it would be impossible to say that the evidence was unlikely to change under cross-examination. Mr. Skupien was elderly and frail. His mental capacity was at issue — the medical records contained repeated diagnoses of paranoia and dementia. There was also the possibility that his injuries were caused by a fall rather than an assault — the medical records revealed a number of complaints of fatigue, weakness and dizziness and the examining physician, Dr. Pietraszek, testified that the injuries could have resulted from a fall (A.R., vol. 2, at p. 259). The evidence of the garbage bags filled with Mr. Skupien's possessions provided little assistance in assessing the likely truth of his statement — he could have filled those bags himself. Ms. Stangrat's obvious motive to discredit Mr. Khelawon presented further difficulties. The initial allegations were made to her — Dr. Pietraszek acknowledged in his evidence that when he saw Mr. Skupien, Ms. Stangrat was present and may have helped him by giving some indication of what happened. The extent to which Mr. Skupien may have been influenced in making his statement by this disgruntled employee was a live issue. Mr. Skupien had issues of his own with the way the retirement home was managed. This is apparent from his rambling complaints on the police video itself. The absence of an oath and the simple "yes" in answer to the police officer's question as to whether he understood that it was important to tell the truth do not give much insight on whether he truly understood the consequences for Mr. Khelawon of making his statement. In these circumstances, Mr. Skupien's unavailability for cross-examination posed significant limitations on the accused's ability to test the evidence and, in turn, on the trier of fact's ability to properly assess its worth.

108 As indicated earlier, the crux of the trial judge's finding that the evidence was sufficiently trustworthy was based on the "striking similarities" between the statements of the five complainants. As Rosenberg J.A., I too would not reject the possibility that the presence of a striking similarity between statements from different complainants could well provide sufficient cogency to warrant the admission of hearsay evidence in an appropriate case. However, the statements made by the other complainants in this case posed even greater difficulties and could not be substantively admitted to assist in assessing the reliability of Mr. Skupien's allegations. For example, the videotaped interview with Mr. Dinino which formed the basis of the second conviction against Mr. Khelawon was nine minutes in length. It was preceded by a 30-minute interview with the police. The police officer had no notes of the initial interview. Cst Pietroniro acknowledged that it "was very difficult" to get Mr. Dinino to answer questions and that much of the videotape is inaudible. Cst Pietroniro would generally put to Mr. Dinino what he thought Mr. Dinino was saying and Mr. Dinino would respond "yes" or "yeah". Cst Pietroniro agreed that he was making an educated guess as to what Mr. Dinino was saying and that there were some things said by Mr. Dinino that he did not understand. Quite apart from these difficulties, it is also far from clear on the record on precisely what features the trial judge based his finding that there was a "striking similarity" between the various statements. However, I do not find it necessary to elaborate on this point. The admissibility of the other statements is no longer in issue. The Court of Appeal unanimously ruled them inadmissible.

109 I conclude that the evidence did not meet the reliability requirement. The majority of the Court of Appeal was correct to rule it inadmissible.

8. Conclusion

110 For these reasons, I would dismiss the appeal.

Appeal dismissed.

Pourvoi rejeté.

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