Court File No. CV-12-9545-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 3113736 CANADA LTD., 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

(the "**Applicants**")

BOOK OF AUTHORITIES OF THE APPLICANTS/MOVING PARTY
(Re Leave under Rule 39.02 and Adjournment Motions, Returnable November 29, 2018)

November 27, 2018	**BLANEY MCMURTRY LLP** Barristers & Solicitors 2 Queen Street East, Suite 1500 Toronto ON M5C 3G5 **David T. Ullmann** (LSO #42357I) Tel: (416) 596-4289 Fax: (416) 594-2437 Email: dullmann@blaney.com **Alexandra Teodorescu** (LSO # 63889D) Tel: (416) 596-4279 Fax: (416) 594-2437 Email: ateodorescu@blaney.com *Lawyers for the Applicants*
TO:	**Service List**

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Proceeding commenced at **TORONTO**

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TAB 1

CITATION: Elgner v. The Estate of Harvey Freedman, 2013 ONSC 2176
COURT FILE NO.: CV-12-451862
DATE: 20130412

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Carol Ann Elgner v. The Estate of Harvey Freedman and Alana Freedman

BEFORE: Master Glustein

COUNSEL: Melvyn L. Solmon and Julie K. Hannaford for the plaintiff

Thomas Slahta and Aaron Hershtal for the defendants

HEARD: April 11, 2013

Endorsement

[1] I grant the motion by the plaintiff, Carol Ann Elgner ("Elgner") under Rule 39.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*") for leave to examine Aaron Hershtal ("Hershtal") pursuant to Rule 39.03.

The applicable law

[2] I rely on the criteria set out in *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, 2009 CarswellOnt 6914 (Div. Ct.) ("*First Capital*") at para. 13 and consider the following factors:

(i) Is the evidence relevant?

(ii) Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?

(iii) Would granting leave result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?

(iv) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

[3] The court must take a flexible, contextual approach under Rule 39.02(2) having regard to the overriding principle in Rule 1.04 that the rules are to be interpreted liberally to ensure a just and timely resolution of the dispute (*First Capital*, at para. 14).

[4] If a deponent has no actual knowledge, undertakings may be sought or the person with knowledge could be examined with leave if necessary under Rules 39.02 and 39.03 (*Mapletoft v. Service*, 2008 CarswellOnt 897 (Mast.) ("*Mapletoft*") at footnote 3).

[5] Relevance must be considered in the context of the substantive motion which is to be heard by the court. On a particulars motion, an issue for the court is whether the particulars are within the knowledge of the party demanding them (*Pennyfeather v. Timminco Limited*, 2011 ONSC 4257 (CanLII) (S.C.J.) at para. 61).

[6] The court can consider proportionality when determining a right to further examinations (*Blenkhorn v. Mazzawi*, 2010 ONSC 699 (CanLII) (S.C.J.) at paras. 20-24).

Application of the law to the evidence before the court

[7] I first review the four factors in *First Capital*.

[8] **Relevance of the evidence:** For the particulars motion, the defendants rely on affidavit evidence from Beverly Jusko ("Jusko"), a lawyer at the plaintiff's law firm, to demonstrate, in part, that the particulars sought are not within the defendants' knowledge. Jusko stated in her affidavit sworn November 21, 2012 (the "Jusko Affidavit") that she was advised by (i) Sharon Freedman ("Sharon"), the estate trustee, and (ii) the defendant Alana Freedman ("Alana") that neither of them had knowledge of the particulars sought.

[9] By endorsement dated January 16, 2013, Master Muir ordered that Sharon and Alana be examined under Rule 39.03 on the basis that Alana and Sharon may have relevant evidence on the issue of whether the particulars requested were within the defendants' knowledge. Master Muir held that it would be inappropriate to assume that the Rule 39.03 examinations would become "early discovery" and stated that "[i]f the scope of the Rule 39.03 examinations strays from issues relevant to the particulars motion, I am sure that counsel for the defendants will quickly object. The question of relevance will then be determined by the court on the basis of actual questions and not speculation". The significant number of refusals from the examinations of Sharon and Alana and the vigorously contested legal issues confirm Master Muir's foresight.

[10] The issue of the defendants' knowledge about the issues on which particulars are sought (which include the scope of the Freedman retainer) is relevant to the particulars motion, as is demonstrated by Jusko stating her purported knowledge of the action arising from positions taken by Elgner's husband Claude Elgner ("Claude") in divorce proceedings and the scope of Harvey Freedman's retainer for Claude's father, Ben Elgner (see paragraphs 3 and 4 of the Jusko Affidavit).

[11] On Jusko's cross-examination, her evidence was that she relied on the statement of claim in order to make the above assertions in her affidavit (questions 109 and 126 of the transcript). However, a statement of claim is not an evidentiary basis on which to support factual statements in an affidavit. Further, Jusko acknowledged that (i) the affidavit was drafted by Hershtal; (ii) Jusko accepted that Hershtal would have undertaken due diligence to ensure its accuracy; and (iii) Jusko "didn't do very much inquiry at all" to inform herself of the accuracy of her affidavit

evidence (question 118 of the transcript) other than reviewing the statement of claim (which she would have been required to do to support her statements at paragraphs 7 and 8 of her affidavit).

[12] While defendants' counsel added at the cross-examination that Jusko also looked at documents attached to her affidavit as exhibits, defendants' counsel at the present motion could not indicate any documents (other than the statement of claim) which would support Jusko's statements at paragraphs 3 and 4 of her affidavit.

[13] Consequently, while Elgner could have decided to take the position on the upcoming particulars motion that the court should give no weight to Jusko's evidence, Elgner is also entitled to the evidence of the person who has knowledge of an issue which may be relevant to the motion. Had Jusko stated in her affidavit that the source of her information was Hershtal, the same issue would have been before Master Muir at the earlier Rule 39.03 motion rather than having to be addressed after Jusko's cross-examination which was based on her affidavit which purported to be her knowledge.

[14] For the above reasons, I find that Elgner has met the first factor under the *First Capital* test.

[15] **The evidence responds to a matter raised on cross-examination:** The lack of personal knowledge of Jusko as to the evidence she provided at paragraphs 3 and 4 of her affidavit could not have been discovered until cross-examination, as Jusko swore that the information was within her personal knowledge. Further, Jusko's lack of information about any matter related to this particular action was also discovered on cross-examination, when she acknowledged that (i) she had not worked on the file (except to swear the affidavit) (questions 49 and 76 of the transcript); (ii) she had no knowledge of the efforts made by litigation counsel to obtain particulars other than what she stated in her affidavit (question 64 of the transcript); (iii) she had only spoken to Hershtal about the affidavit (question 93 of the transcript); (iv) she had taken no steps to inform herself of the truth of her statement at paragraph 3 of her affidavit about positions taken by Claude (other than she assumes that she obtained the information by reading the statement of claim) (questions 119-22 of the transcript); and (v) she did not do very much inquiry because Hershtal had given her the affidavit and Jusko was satisfied that Hershtal had done the necessary inquiries (question 118 of the transcript).

[16] All of the above evidence could not have been known prior to the cross-examination and was raised on the cross-examination.

[17] Consequently, I find that Elgner has met the second factor under the *First Capital* test.

[18] **No non-compensable prejudice:** There is no evidence of any non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment. As I discuss above, the lack of involvement of Jusko in any of the litigation, and as such her inability to provide any evidence as to the knowledge of litigation counsel about the particulars demanded in the motion, only arose at the cross-examination when it became apparent that Jusko had no personal knowledge about the litigation despite her statements at paragraphs 3 and 4 of her affidavit.

[19] Consequently, I find that Elgner has met the third factor under the *First Capital* test. An adjournment of the particulars motion to permit examination of Hershtal does not require further terms or costs. It is a just and fair requirement for the court to have the evidence necessary to consider whether the knowledge of litigation counsel can or ought to be imputed to the client on a particulars motion.

[20] **Explanation for why the evidence was not provided at the outset:** There would have been no basis for Elgner to have sought a Rule 39.03 examination of Hershtal "at the outset" as the only evidence from litigation counsel was by Jusko and her evidence did not raise the issue of lack of personal knowledge about the particulars sought.

[21] Consequently, I find that Elgner has met the fourth factor under the *First Capital* test.

[22] I now address the additional factors I discuss at paragraphs 3 to 6 above.

[23] A contextual approach for this motion leads to the result that Hershtal should be examined as to his knowledge relevant to the particulars motion. Jusko has no actual knowledge of any matter with respect to the litigation other than swearing the affidavit and even on that minimal involvement, at best Jusko did nothing other than accept Hershtal's affidavit and review the pleadings and exhibits. This is the type of case raised by Master MacLeod in his comments in *Mapletoft*.

[24] Finally, the concept of proportionality relied upon by the defendants does not support a conclusion against examination. The information sought from Hershtal cannot be obtained from any other source except litigation counsel, and there is no evidence that an examination would be unduly onerous or time-consuming. Any issues of privilege or relevance which arise on the Hershtal examination will be addressed by the court together with similar issues of privilege or relevance arising from the examinations of Alana and Sharon and the cross-examination of Jusko, all to be heard collectively as a long motion to be scheduled with the court.

Order and costs

[25] For the above reasons, I grant the motion under Rule 39.02(2) for leave to examine Hershtal pursuant to Rule 39.03. The issue of costs for this motion is reserved to the court hearing the refusals motion, so that the court can consider the appropriate costs order in light of the court's assessment of the utility of the examination and any maintained refusals, or if the court on the refusals motion determines appropriate, reserve the costs of the present motion to the court hearing the particulars motion.

[26] I am not seized of any further motions in this matter. It is not an appropriate case for case management as there is no lack of cooperation between counsel and the other factors in Rule 77.05(4) are not apparent at this point.

[27] Counsel agreed to schedule the collective refusals motion as a long motion. Further, given that the setting aside motion and the particulars motion have each been scheduled for an hour, I would anticipate that it would be more appropriate to book both of those motions

collectively as a long motion (perhaps even for a full day hearing) to ensure that all issues are fully addressed. I make no order on the scheduling of the two substantive motions, but I advised counsel at the hearing that there is a general risk that the court will not hear matters as regular motions which ought to have been booked as long motions.

[28] I thank counsel for their thorough written and oral submissions which were of great assistance to the court.

_____

Master Benjamin Glustein

DATE: April 12, 2013

TAB 2

Sopinka, Lederman & Bryant

The Law of Evidence in Canada

FIFTH EDITION

Sidney N. Lederman • Alan W. Bryant
Michelle K. Fuerst

LexisNexis

evolved into a different form, in which witnesses presented evidence to a jury which had no prior knowledge or information on the matters in question.

§6.8 Since jurors were called upon to scrutinize the evidence of witnesses, the danger of hearsay became readily apparent. To regulate the quality of evidence that could be presented for consideration by the jury, the rule against hearsay was propounded.[6]

2. *Hearsay Dangers When Declarant Not Before the Court*

§6.9 The law assumes that oral testimony of witnesses should not be accepted at face value and has accordingly built in such safeguards as the requirement of an oath or affirmation, the right of cross-examination and the creation of the crime of perjury.[7] Special attention has been given to hearsay as being particularly fraught with untrustworthiness and unreliability because its evidential value rests on the credibility of an out-of-court asserter who is not subject to the oath, cross-examination or a charge of perjury. As Dickson J. (as he then was) stated in *R. v. Abbey*:

> The main concern of the hearsay rule is the veracity of the statements made. The principal justification for the exclusion of hearsay evidence is the abhorrence of the common law to proof which is unsworn and has not been subjected to the trial by fire of cross-examination. Testimony under oath, and cross-examination, have been considered to be the best assurances of the truth of the statements of facts presented.[8]

§6.10 In addition to concerns about the untruthful declarant, hearsay dangers also encompass those arising from an untested statement made by an honest but

---

6 For a detailed exposition of the origin of the rule, see A.L.T. Choo, *Hearsay and Confrontation in Criminal Trials* (Oxford: Clarendon Press, 1996); R.J. Delisle, "Hearsay Evidence" [1984] L.S.U.C. Special Lectures, at 59-64; R.W. Baker, *The Hearsay Rule* (London: Pitman, 1950), at 7-12. A different opinion was enunciated in "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harv. L. Rev. 177, at 177-84, by Professor E.M. Morgan, who felt that the rule arose out of the adversarial nature of the proceedings. Counsel would object to the introduction of hearsay evidence because it was not under oath, or subject to cross-examination. Because counsel could waive both the oath and the right to cross-examine, Morgan suggested that it was the litigants and not the jurors who were to be protected from this evidence. To the same effect, see *R. v. Eisenhauer* (1998), 14 C.R. (5th) 35, at 59, [1998] N.S.J. No. 28 (N.S.C.A.). Fairness to the parties requires that they have an opportunity to confront adverse witnesses and hearsay precludes that opportunity: *R. v. Starr*, [2000] 2 S.C.R. 144, [2000] S.C.J. No. 40, at para. 199 (S.C.C.).

7 Justice Charron in *R. v. Khelawon*, [2006] 2 S.C.R. 787, [2006] S.C.J. No. 57, at para. 80 (S.C.C.) stated: "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."

8 [1982] 2 S.C.R. 24, at 41, [1982] S.C.J. No. 59 (S.C.C.). Also see *R. v. Starr*, [2000] 2 S.C.R. 144, 147 C.C.C. (2d) 449, at 515, [2000] S.C.J. No. 40 (S.C.C.).

TAB 3

1996 CarswellOnt 4226
Ont. C.A.

R. v. Shayesteh

1996 CarswellOnt 4226, [1996] O.J. No. 3934, 111 C.C.C. (3d) 225, 31 O.R. (3d) 161, 32 W.C.B. (2d) 448, 94 O.A.C. 81

Her Majesty the Queen (Respondent) and Sohrab Shayesteh (Appellant)

Carthy, Austin and Charron JJ.A.

Heard: August 14 and 15, 1996
Judgment: November 8, 1996
Docket: CA C20184

Counsel: *Frank Addario* and *Cynthia Peterson*, for appellant.
Croft Michaelson, for the Crown.

Subject: Criminal

Headnote

Criminal law --- Search and seizure — Unreasonable search and seizure

Criminal law --- Trial by indictment — Rights of accused — Presence at trial — General

Criminal law --- Sentencing — Sentencing principles — Multiple factors considered

Criminal law — Search and seizure — Unreasonable search and seizure — Affiant not required to have subjective belief in existence of sufficient grounds for intercepting private communications — Accused's rights under s. 8 of Charter not violated because authorization to intercept private communications overly broad in that it listed unnecessary targets where accused proper target — Accused unable to rely on possible violation of rights of other persons — Canadian Charter of Rights and Freedoms, s. 8.

Criminal law — Trial by indictment — Rights of accused — Presence at trial — Tape of intercepted communications in Farsi and English language transcript admitted in evidence at trial — Trial judge not erring in directing that only part of transcript be read to jury — Accused's right to be present during whole of trial and to understand proceedings not infringed by failure to read all of transcript in open court — Criminal Code, R.S.C. 1985, c. C-46, s. 650.

Criminal law — Sentencing — Sentencing principles — Multiple factors considered — Accused sentenced to eight years' imprisonment for conspiracy to import cocaine and eight years concurrent for conspiracy to import opium — Sentence affirmed on appeal.

The accused was convicted of conspiracy to import cocaine and conspiracy to import opium, and was sentenced to eight years' imprisonment on each count, the terms to be served concurrently. The Crown's case at trial was based in large part on intercepted private communications. During the course of the police investigation, four successive judicial authorizations were obtained for the interception of private communications. At the commencement of the investigation, the accused was not known to the police. It was only as a result of the interception of the communications of D, pursuant to the second authorization, that the police became aware of the accused's identity. The accused was then targeted directly pursuant to the third and fourth authorizations. On his appeal from conviction, the accused argued that D was improperly targeted under the second authorization, and that, consequently, any information obtained as a result had to be set aside for the purposes of assessing the validity of the later authorizations. He also argued that the trial judge erred in not having the entire English-language transcript of the tapes, which were in Farsi, read to the jury (both the tapes and the transcript in full having been admitted in evidence). There was also an appeal from the sentence.

Held:

The appeal was dismissed.

The affiant was not required to have a subjective belief in the existence of sufficient grounds for intercepting D's calls. In obtaining the second authorization, the affiant omitted from his summary of telephone calls between a third person and D some words which arguably provided an innocent explanation for suspicious elements of the conversations. However, the trial judge properly found that there was no mala fides on the part of the affiant. Moreover, the disclosure of the word would not have rendered the other possible (not innocent) inference available to the issuing justice untenable in the circumstances. The non-disclosure was not material. While the third and fourth authorizations may have been overly broad in that unnecessary targets were included, the accused was not such an unnecessary target, and he could not rely upon the possible infringement of the rights of third parties as rendering the search unreasonable, even with respect to those persons properly included in the authorization. The accused's rights under s. 8 of the *Canadian Charter of Rights and Freedoms* were not violated.

Whether tapes of communications in a foreign language will be played for the jury during the course of the trial, and if so, to what extent, is a matter of discretion for the trial judge. Where the translation of the communications takes the form of a transcript, the transcript should be filed in evidence, but the extent to which the transcript should also be read during the course of the trial depends on the particular facts of the case, and is a matter of discretion for the trial judge. The accused's right to be present throughout the trial was not infringed in this case. His contention that he was not afforded the opportunity to "hear" or understand the evidence, as introduced through the transcripts in the English language (which he could not read), was not credible. No issue was raised with respect to the accuracy of the translation. The accused was provided with an appropriate translation of the English transcripts in his language in the form of the actual tapes in Farsi.

The accused received the same sentence as his co-accused, despite the fact that the latter spent four months in pre-trial custody, while the accused spent 15 months in pre-trial custody. Nevertheless, the sentence was a fit one.

APPEAL from conviction for conspiracy to import cocaine and opium, and from sentence.

The judgment of the court was delivered by *Charron J.A.*:

I. Introduction

1 The appellant appeals from his conviction on one count of conspiracy to import cocaine and on a second count of conspiracy to import opium, both contrary to s.5(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1. He also seeks leave to appeal his sentence of eight years imprisonment imposed with respect to each count, to be served concurrently.

2 The appeal against conviction raises two issues:

> 1. Did the trial judge err in admitting into evidence the intercepted private communications tendered by the prosecution?
>
> 2. Did the trial judge err by not requiring the transcripts of the English translations of the intercepted private communications to be read to the jury?

3 The appellant seeks to appeal his sentence on the basis that it is harsh and excessive in all the circumstances of this case.

II. Admissibility of the Intercepted Communications

4

A. The Facts

5 The appellant was alleged to have conspired with Ramin Shakeri and Bahram Shayesteh, his brother, to import cocaine and opium into Canada. He was jointly charged with Ramin Shakeri. Three other individuals Mohammed Mehrabnia (also known as Daryoosh or Dariush), Vahid Momeni and Jamshid Farhadi (also known as Khorshid) were charged with related but separate conspiracies as a result of the same investigation.

6 The Crown's case against the appellant depended in large part on a number of telephone calls among the appellant, Shakeri and Bahram Shayesteh between February 2 and 22, 1993, all of which were intercepted pursuant to a judicial authorization obtained on January 27, 1993. The Crown at trial also relied upon evidence concerning the movements of the appellant and Shakeri on February 13 and 20, 1993 and the seizure of 410 grams of opium and 290 grams of cocaine from Shakeri's person when he returned on a flight from Los Angeles on February 22, 1993.

7 The appellant argues that the judicial authorization dated January 27, 1993 was invalid as it was founded on evidence obtained from prior illegal searches. As a result, he argues that the interception of his communications pursuant to that authorization constituted an infringement of his right to protection against unreasonable search and seizure as guaranteed by s.8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. Accordingly, the appellant submits that this evidence, obtained in violation of his *Charter* right, should have been excluded pursuant to s.24(2) of the *Charter*.

8 At the commencement of the trial, a lengthy voir dire was held to determine the admissibility of the intercepted communications with respect to the appellant, his co-accused Shakeri and the three other individuals Daryoosh, Momeni and Farhadi who were scheduled for a separate trial on related conspiracies. The trial judge found that there had been no breach of the appellant's right under s.8 of the *Charter* and consequently ruled that this evidence was admissible. Thereafter, a jury was selected and the appellant and Shakeri were arraigned. Three days into the Crown's case, the co-accused Shakeri re-elected his mode of trial and pled guilty to both charges. The appellant's trial continued. After a 14-day trial, the appellant was found guilty on both counts.

9 The correctness of the trial judge's ruling with respect to the admissibility of the intercepted communications into evidence forms the basis of the first ground of appeal against conviction. In order to dispose of this ground of appeal, it is necessary to briefly review the course of the investigation which led to the charges being brought against the appellant.

10 During the course of the police investigation, four successive judicial authorizations were obtained for the interception of private communications. These authorizations were issued on the following dates: July 24, 1992; September 25, 1992; December 3, 1992; and January, 27, 1993. Detective Constable John Green was the affiant on the four applications.

11 At the commencement of the investigation, the appellant was not known to the police. It was only as a result of the interception of Daryoosh's communications pursuant to the second authorization that the police became aware of the appellant's identity. The appellant's communications were then targeted directly, pursuant to the third and fourth authorizations, because they were likely to assist in the furtherance of the investigation.

12 As stated earlier, all communications tendered in evidence by the Crown, at the appellant's trial, were intercepted pursuant to the fourth authorization. However, given the inter-relatedness of the authorizations, it is necessary to deal with each of the authorizations in turn.

1. Authorization dated July 24, 1992

13 The only targeted person in this first authorization who is of direct relevance to this appeal is Farhadi, also known as Khorshid, one of the above-mentioned persons who was eventually charged with related conspiracies. The appellant concedes that there were reasonable grounds to believe that the interception of Farhadi's communications would assist the investigation and that Farhadi was properly targeted under this authorization.

14 However, despite this concession, the appellant contends that there were a number of misrepresentations contained in the affidavit sworn in support of this first wiretap application. He also argues that this first authorization was far too broad in scope in that it targeted a number of other persons without sufficient grounds. Consequently, the appellant submits that because this first authorization was obtained during the course of this one ongoing investigation, these two factors should be considered by this court in its overall assessment of the reasonableness of the searches.

2. Authorization granted on September 25, 1992

15 The appellant's main arguments with respect to the first ground of appeal pertain to the second authorization granted on September 25, 1992. As stated earlier, the appellant was not directly targeted under this authorization. However, the interception of Daryoosh's communications, effected pursuant to this authorization, in turn implicated the appellant because he was either a party to, or referred to during the course of, some of the intercepted calls. These calls then formed the principal basis for targeting the appellant in the third authorization granted on December 3, 1992.

16 The appellant contends that Daryoosh was improperly targeted under this second authorization. Consequently, he argues that any information obtained as a result must be set aside for the purposes of assessing the validity of the later authorizations. The validity of this second authorization is challenged by the appellant on three grounds:

> 1. the lack of an objective basis set out in the supporting affidavit for concluding that there were reasonable and probable grounds to believe that the interception of Daryoosh's communications would assist the investigation;
>
> 2. material non-disclosure by the affiant; and
>
> 3. the lack of a subjective belief on the part of the affiant in the required grounds.

i) Objective basis for interception

17 The first affidavit and authorization were attached as an exhibit to Green's affidavit in support of this second application. Three calls intercepted pursuant to the first authorization formed the basis for targeting Daryoosh in the second authorization.

18 The first of these calls was made to Daryoosh's residence by Farhadi on September 1, 1992. At that time, Farhadi spoke to an unknown male. The following is a summary of the communication as set out in the officer's affidavit:

> Khorshid [Farhadi] calling Unknown Male, Khorshid asks if he's at home he wants to make a call from his place. Receiver says no problem.

19 On September 10, 1992, at 5:40 p.m., Farhadi called the same number again and spoke to Daryoosh. The following is a summary of the communication as set out in the officer's affidavit:

> Khorshid to Dariush [Daryoosh], Dariush says I said he got my message one or two hours ago my wife called and said there was a difficulty with the kid in the airport. He had no I.D. with him, they didn't let him fly. Dariush says it was postponed for a week. I mailed his I.D. his own Canadian passport through DHL. Mehrdad was here last night. Khorshid says if you are not busy I will bother you for a few minutes. Dariush says please do, should I call you at night? Khorshid says late at night or what? Dariush says anytime you like it doesn't make a difference to me. I'll be awake late at night. Khorshid says in one or two hours if possible.

20 The same day, at 7:42 p.m., Daryoosh called Farhadi. The content of the call is summarized as follows:

> Dariush to Khorshid. Dariush says I have to go to my friend's place. I have to call her husband who works in airport for the ticket. I am sorry about this. Anytime you think. Khorshid says I'll contact you tomorrow. Dariush says I'll be home after 12:00.

It should be noted that the affidavit filed in support of this second application contained further grounds for believing that Farhadi was involved in the trafficking of opium.

21 With respect to the first call, Green testified that he found it unusual that someone would call another person and ask to use that person's telephone to make a call. Green believed that Farhadi was arranging to use the telephone at Daryoosh's residence in order to make a drug-related call. With respect to the second call, Green testified that he

found it unusual that someone would be in possession of another person's passport and would be sending that passport to another destination by courier. Green believed that the second call was drug-related and that the reference to the kid was possibly a reference to a drug courier. The officer also testified that he believed that the third call was a follow-up on the second call and was also drug-related.

22 Green conceded in his testimony that the police had not carried out any follow-up investigation prior to applying for this second authorization in order to determine whether Farhadi had in fact attended at Daryoosh's residence to make a call or if Daryoosh had in fact sent out a passport as stated in the call.

(ii) Non-disclosure

23 With respect to the references made to the "kid" and to certain difficulties at the airport, both Khorshid and Dariush had used the words "[i]t is Iran". Officer Green agreed that this was a clear reference to the location of the airport out of which the "kid" was attempting to fly. This information, however, was excluded from the summary contained in Green's affidavit.

24 The appellant contends that this reference to "[i]t is Iran" provides a plausible explanation for the content of the call since the appellant himself is from Iran and he has a wife and child. The officer at trial could not explain why he had excluded the words "[i]t is Iran" from the summary in the affidavit. He denied knowing, at the time he swore his affidavit, that the appellant had a wife and child and that they had recently travelled to Iran. However, Green admitted that he became aware of this fact prior to the next application for an authorization on December 2, 1993 but that he did not reveal this fact at that time.

25 The appellant contends that the non-disclosure of the phrase "[i]t is Iran" was material to the second authorization. He submits that, although the conversation was considered by Green to be suspicious, as relating to a potential drug courier having difficulties, and that this was a plausible interpretation, it was nevertheless up to the issuing justice to make an independent determination on the basis of all the relevant information and decide whether there was in fact a reasonable basis for this inference.

(iii) Affiant's subjective belief

26 It is the appellant's contention that both a subjective belief, on the part of the officer, in the existence of sufficient grounds for intercepting Daryoosh's calls and the existence of objective facts to substantiate that belief are necessary for the issuance of an authorization.

27 Green testified at the voir dire that he relied solely on these three calls in his application for an authorization to intercept Daryoosh's communications. At one point, he testified that it was his belief that the interception of Daryoosh's communications "may" assist the investigation. In cross-examination, he defined what he believed to be the threshold which has to be met in order to secure authorization for such interceptions. He testified that he believed that it was sufficient to show that the interceptions "may", rather than "would", assist in the investigation.

28 It is on the basis of this testimony as well as the wording of the officer's affidavit, which contains the word "may" as opposed to "would" or "will", that the appellant contends that the affiant lacked the requisite subjective belief in the existence of sufficient grounds for intercepting Daryoosh's calls. He argues that the officer believed in no more than a *possibility* that the interception of the calls *may* assist the investigation as opposed to the constitutionally mandated requirement that there be *probability* that it *would* have that effect.

29 Finally, the appellant argues that this second authorization was too broad in its reach as it unjustifiably targeted a number of individuals.

30 On these grounds, the appellant maintains that the interception of calls between Daryoosh and other persons pursuant to this second authorization was illegal and any information obtained thereby must therefore be excised for the purposes of determining the validity of later authorizations.

31 In response to this argument, the Crown argues firstly that the appellant has no standing to allege a violation of Daryoosh's *Charter* rights on review and that any information obtained as a result of the interception of Daryoosh's calls may properly afford a foundation for the interception of the appellant's communications pursuant to subsequent authorizations. In the alternative, the Crown maintains that even if the appellant does have standing to raise a violation of Daryoosh's s. 8 rights, sufficient grounds were articulated in affidavit number two to found a belief that the interception of his communications would assist in the investigation. Accordingly, Daryoosh was properly named in authorization number two and any information obtained thereby could be considered on subsequent applications for authorization.

3. Authorization dated December 3, 1992

32 Green was again the affiant with respect to this third authorization. The previous affidavits and authorizations were attached as exhibits to his third affidavit. Green provided particulars concerning the implementation of the second authorization. He also set out numerous calls involving Daryoosh, which had been intercepted pursuant to the second authorization. The appellant was a party to some of these calls. However, several of the calls were communications solely between Daryoosh and the appellant's brother, Bahram Shayesteh. Some of these latter communications contained references to the appellant and supported the inference that the appellant was also involved in drug-related activity. Green's affidavit also set out further grounds to intercept communications including surveillance evidence and information obtained from an informant. Both Daryoosh and the appellant, among several others, were targeted under this third authorization.

33 It is the appellant's position that if all the information obtained pursuant to the second authorization is excised from the third affidavit, there remains insufficient grounds to target the appellant in this third authorization. The Crown concedes that the excision of this information would bring about this result.

34 The appellant also argues that without the excised material there remains insufficient information to provide grounds to target Daryoosh in this third authorization. The Crown disagrees and states that even assuming that affidavit number two fails to articulate sufficient grounds to intercept Daryoosh's communications and that the derivative communications must be excised on review, affidavit number three sets out sufficient other grounds to justify the interception of Daryoosh's communications. The Crown therefore argues that all of Daryoosh's communications which were intercepted under the authority of authorization number three can therefore be considered on the application for authorization number four regardless of the result with respect to authorization number two.

35 The appellant also argues, as with the previous authorizations, that this authorization was too broad in its reach and that this is a factor to be considered in the determination of the reasonableness of the search.

4. Fourth and final authorization dated January 27, 1993

36 Green was again the affiant with respect to this authorization. Copies of the previous authorizations and affidavits were attached as exhibits to his fourth affidavit. In his affidavit, Green set out the particulars of the interceptions made under the third authorization. Both Daryoosh and the appellant, as well as many others were targeted under this authorization.

37 The appellant concedes that there were sufficient grounds to target the appellant under this authorization if the fruits of the prior searches are considered. He argues, however, that if the information obtained from the second and third authorizations is excised, there are insufficient grounds to target the appellant under this final authorization.

38 The Crown maintains that even if the information obtained from authorization number two must be excised, there remain sufficient grounds to intercept Daryoosh's communications based on the interceptions which flowed from the third authorization. These calls alone provide ample grounds for targeting the appellant in this final authorization.

39 The appellant again advances the argument that the authorization granted was too broad.

B. Analysis

1. Appellant's standing

40 With respect to the interception of the appellant's own calls, no issue is raised as to his standing to assert a violation of his s. 8 *Charter* rights. The Crown argues, however, that the appellant has no standing to assert a violation of Daryoosh's rights under these circumstances and he therefore has no right to demand excision of the information derived from any such violation, if it is found to exist. The Crown states that the appellant only has standing to assert a violation of his own *Charter* rights and can therefore only demand excision of information derived from interceptions which constitute such a violation of his rights. In this regard, reliance is placed on *R. v. Edwards* (1996), 192 N.R. 81 (S.C.C.) and *R. v. Pugliese* (1992), 71 C.C.C. (3d) 295 (Ont. C.A.).

41 In my view, the cases of *Edwards* and *Pugliese* can easily be distinguished, and this argument must fail in this case. The appellants in both *Edwards* and *Pugliese* were unable to establish that they had an expectation of privacy with respect to the impugned search and consequently they could not argue that their rights had been violated. In this case however, since the appellant's own telephone calls were intercepted as a result of the targeting of Daryoosh in the second and third authorizations, he clearly had an expectation of privacy with respect to those communications. This expectation of privacy is sufficient to give him standing to dispute the legality of those interceptions. The fact that a consideration of the legality of these interceptions in effect entails a consideration of Daryoosh's s. 8 rights, because the statutory requirements are identical to the constitutional requirements of s.8, does not affect the appellant's standing to bring his application.

2. Applicable test on review

42 The applicable legal principles are not at issue in this appeal. It is uncontroverted that the interception of private communications constitutes a search or seizure within the meaning of s.8 of the *Charter*: *R. v. Sanelli*, *(*sub nom. *R. v. Duarte)* [1990] 1 S.C.R. 30. "A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable": *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.) at 14. In this case, the appellant contends that his s. 8 rights were infringed because the interception of his private communications was not authorized by law.

43 The wilful interception of a private communication is an offence contrary to s.184 of the *Criminal Code*, R.S.C. 1985, c. C-46, except in certain specified circumstances or in cases where prior authorization is obtained. The requirements with respect to prior wiretap authorization are as set out in the *Criminal Code* (s.185).

> [B]efore granting an authorization, a judge must be satisfied by affidavit that there are reasonable and probable grounds to believe that:
>
> (a) a specified crime has been or is being committed, and
>
> (b) the interception of the private communication in question will afford evidence of the crime": *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 at 187.

Section 186 of the *Criminal Code* further requires that, prior to granting an authorization, the judge to whom the application is made must be satisfied:

(a) that it would be in the best interests of the administration of justice to grant the authorization and

(b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

44 It is also clear that the trial judge in this case, as reviewing justice, should not review the authorization *de novo*. Neither should this court. The Supreme Court in *R. v. Garofoli* [(1990), 60 C.C.C. (3d) 161] stated the following at pp. 187-8:

The correct approach is set out in the reasons of Martin J.A. in this appeal. He states (at p. 119):

> If the *trial judge* concludes that, on the material before the authorizing judge, there was no basis upon which he could be satisfied that the pre-conditions for the granting of the authorization exist, then, it seems to me that the trial judge is required to find that the search or seizure contravened s. 8 of the *Charter*.

The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

3. Sufficiency of the grounds in support of prior authorizations in this case

45 As stated earlier, the appellant's main arguments with respect to his first ground of appeal pertain to the second authorization granted on September 25, 1992 since all the information which eventually led the police to him essentially flowed from this authorization. The appellant concedes that all statutory requirements were met except the requirement with respect to the sufficiency of the grounds relied upon in support of the application. The question for determination is then whether Daryoosh was properly targeted in this second authorization: in effect, were there reasonable and probable grounds to believe that Daryoosh was someone whose private communications would assist in the investigation?

46 The appellant contends that the grounds raised a suspicion only and could not provide a proper basis for the granting of the authorization. If the grounds were insufficient as contended, the interception of Daryoosh's calls, which included calls to which the appellant was a party, was illegal and in contravention of the appellant's s. 8 rights. If, on the other hand, Daryoosh was properly targeted, the appellant has no cause for complaint. His communications with Daryoosh would have been properly intercepted under the purview of the authorization as communications with a person unknown to the authorities.

(i) Objective basis for interception of Daryoosh's calls under second authorization

47 It is not disputed that the grounds articulated in the second affidavit provided a sufficient basis upon which the authorizing judge could conclude that probable cause existed to believe that Farhadi was the same person as "Khorshid" and that he was engaged in the trafficking of heroin. In my view, this is an important factor to be considered in the assessment of the significance of the calls made by Farhadi to Daryoosh's residence and Daryoosh's call back to him.

48 The trial judge concluded that the affidavit also articulated sufficient grounds such that the authorizing judge could conclude probable cause existed to believe the interception of Daryoosh's communications would assist in the investigation. The appellant contends that, in arriving at this conclusion, the trial judge made two errors: (a) he misapprehended the evidence in one respect; and (b) he improperly considered evidence which had been obtained after the granting of the second authorization.

49 The appellant is correct when he points out that the trial judge at one point in his reasons made reference to one item of evidence (Daryoosh's involvement with two named individuals. Gholampour and Tremblay) which was not contained in the material in support of the second authorization. While the affidavit made reference to the two named individuals and to their involvement in the drug trade, the affidavit contained no information as to Daryosh's involvement with them.

50 As for the alleged second error, I am not satisfied from reading the trial judge's reasons as a whole that he improperly considered subsequently obtained evidence in his consideration of the validity of each of the authorizations. It is clear from the reasons for decision that the trial judge was aware of the correct principles of law. He instructed himself on the appropriate test for review and referred to the relevant governing authorities. Upon reviewing his reasons in their entirety, I am satisfied that any confusion arising as to what evidence he considered with respect to each authorization is not due to error but rather due to the fact that, in his reasons, he dealt with all four authorizations and all four accused at the same time without clearly delineating his analysis with respect to each issue.

51 Notwithstanding the trial judge's misapprehension of evidence with respect to one item of evidence pertaining to the second authorization, I find no error in the trial judge's ultimate conclusion on this issue. When viewed on an objective basis, the three telephone calls relied upon by the affiant in support of his application for authorization were sufficiently compelling, having regard to all the information contained in affidavits numbers one and two, to warrant the interception of Daryoosh's communications. There was very cogent evidence supporting the belief that Farhadi was involved in drug trafficking including an involvement in the importation of drugs.

52 Given this background information, the trial judge was correct in finding that, although capable of an alternative innocent interpretation, the three calls were reasonably capable of supporting the inference that Green placed upon them: one, that Farhadi was concerned about using his own telephone line because he was involved in a drug-related activity; and two, that Farhadi and Daryoosh were involved in arranging for a person to act as a drug courier. I do not agree with the appellant's contention that this information simply provided evidence of association which amounted to no higher than suspicion. One cannot look exclusively at Daryoosh's direct involvement without also considering the context in which the calls were made.

53 Alternatively, the appellant submits that, in order to minimize the effect of the authorization, the issuing justice should have put in a condition that private communications could only be intercepted at Daryoosh's residence when surveillance revealed Farhadi's presence at that location. In my view, such a condition would undoubtedly have been necessary, to ensure that the search was kept within reasonable limits, if the issuing justice only had evidence of the first call to Daryoosh's residence before him (where Farhadi asked to use the phone). However, in light of the two other calls, from which Daryoosh's involvement may reasonably be inferred, it was open to the issuing justice to find that the imposition of such a restricting condition was unwarranted. I therefore find no error in the failure to impose conditions as suggested.

(ii) Non-disclosure

54 The duty of full and frank disclosure requires an affiant to provide all material facts so that the authorization justice can come to an independent conclusion about the significance of the information relied upon in support of an application for wiretap. As stated earlier, in this case, it is the omission of the words "[i]t is Iran" from the affiant's summary of one of the telephone calls which is the cause for complaint with respect to the second authorization.

55 The trial judge correctly stated in his reasons that there is no obligation on the affiant to ignore evidence which is probative of the commission of an offence simply because there may be some alternative innocent explanation. On this basis, he found that the evidence pertaining to this call was properly included in the affidavit.

56 While the appellant takes no issue with this finding, he argues that the trial judge erred in casting the issue in terms of whether the existence of such a potential innocent explanation for the communications barred the police from relying on the call. He argues that the issue should have been whether or not the potential innocent explanation, as revealed

in the words "[i]t is Iran", should have been fully disclosed to the issuing justice so that she could make an independent assessment of the significance of the call.

57 It is incorrect to say that the trial judge simply cast the issue in terms of the police's right to rely on the information. Later in his reasons, the trial judge states as follows:

> In summary, then, with respect to the general complaints about the propriety of the manner in which the interceptions were made and the authorizations obtained, I have concluded that there was no false or misleading disclosure; there was no conduct of Detective Constable Green or anyone associated with him which showed any lack of *bona fides* or any attempt to fraudulently mislead the authorizing judge in order to obtain an authorization which would not otherwise have been given. There is no material disclosed on this hearing which shows that there was any failure to disclose important information which would have in any way affected the outcome. There was no material non-disclosure. In my opinion, the authorizing judge could have or would have issued the authorization in any event. [Emphasis added].

58 While it may have been preferable for the affiant to include the words "[i]t is Iran" in his summary of the second call, I see no basis to interfere with the trial judge's clear finding that there was no *mala fides* on the part of the affiant. It may well be that this item of evidence did not appear to be particularly relevant at the time. In any event, while the words "[i]t is Iran" may provide some evidence of an innocent explanation, its disclosure would by no means have rendered the other possible inference available to the issuing justice untenable on the facts of this case. The ultimate question is whether the non-disclosure was material. The trial judge made no error in finding that it was not.

(iii) Affiant's subjective belief

59 As stated earlier, it is the appellant's contention that both a subjective belief on the part of the officer in the existence of sufficient grounds for intercepting Daryoosh's calls and the existence of objective facts to substantiate that belief are necessary before an authorization may be issued. In my view, this contention is contrary to this court's finding in *R. v. Finlay* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.). Counsel for the appellant concedes that this is so but invites the court to find that *Finlay and Grellette* has effectively been overruled by the later Supreme Court of Canada decision in *R. v. Bernshaw* (1994), 35 C.R. (4th) 201 (S.C.C.). I do not agree.

60 In *R. v. Finlay and Grellette*, the constitutional validity of the relevant *Criminal Code* provisions were called into question. This court noted, at p.71, that the "focal point of counsel's attack" on the constitutionality of the enabling legislation was the wording of s. 178.12(1)(e) [now s.185(1)(e)] which provides that the affidavit in support of the application must set out, among other things, "the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe *may* assist the investigation of the offence" (emphasis added). It was argued that this wording sanctioned reliance on a mere possibility and did not satisfy the requirements of *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 which set a higher threshold of reasonable and probable grounds.

61 This court noted that it was s.178.13 [now s.186] that prescribed the conditions upon which the judge may grant the authorization sought. The applicant is not required to state under oath that he has reasonable and probable grounds for believing that communications concerning the particular offence *will* be obtained through the interception. It is the judge who must be so satisfied in order to meet the constitutional requirements. The court upheld the validity of the legislation.

62 In the subsequent case of *Bernshaw*, the Supreme Court considered the sufficiency of the grounds which permit a police officer to make a demand for a breath sample. Sopinka J., in the majority judgment of the Court, stated as follows at p. 225:

> The *Criminal Code* provides that where a police officer believes on reasonable and probable grounds that a person has committed an offence pursuant to s. 253 of the *Code*, the police officer may demand a breathalyzer. The existence of reasonable and probable grounds entails both an objective and a subjective component. That is, s. 254(3) of the

Code requires that the police officer subjectively have an honest belief that the suspect has committed the offence and objectively there must exist reasonable grounds for this belief: *R. v. Callaghan*, [1974] 3 W.W.R. 70 (Sask. Dist. Ct.); *R. v. Belnavis*, [1993] O.J. 637 (Gen. Div.) (QL); *R. v. Richard* (1993), 12 O.R. (3d) 260 (Prov. Div.); and see also *R. v. Storrey*, [1990] 1 S.C.R. 241, regarding the requirements for reasonable and probable grounds in the context of an arrest.

63 I do not agree that *Bernshaw* in any way overrules *Finlay and Grellette*. The Supreme Court of Canada in *Bernshaw* was dealing with a *Criminal Code* provision that specifically requires the officer to believe in the existence of certain facts on reasonable and probable grounds before he can act upon them. It stands to reason that the officer should be required to have this subjective belief since it is the officer who is authorized to act upon the grounds. The same applies in the case of an arrest. However, this is not so with respect to an application for a wiretap authorization. It is the judicial officer who is authorized to act upon the grounds and grant the authorization, not the applicant. While the officer's belief may be a relevant factor for the authorizing justice to consider, it is in no way determinative of the issue.

64 In any event, in this case, I question whether it is wise to place so much reliance on the police officer's choice of words. The use of the word "may" as opposed to "would" in the affidavit may well have been dictated by the very words of the *Criminal Code*. The relevant portions of the officer's cross-examination on the voir dire certainly reveal a reluctance on his part to depart from the wording of his affidavit. The extent to which one should conclude by his choice of words that he did or did not in fact believe that he had reasonable and probable grounds to seek the authorization is another matter.

65 In the result, since the existence of a subjective belief on the part of the affiant is not required by law, there can be no error on the part of the trial judge in "fail[ing] altogether to advert to this shortcoming" as contended by the appellant.

(iv) Conclusion

66 It follows from the above findings that there was evidence upon which the authorizing justice could grant the second authorization. In the result, the calls intercepted pursuant to authorization number two were legally authorized and there was no breach of the appellant's s. 8 *Charter* rights in this respect. Given this result, there is no issue as to the sufficiency of the grounds to further intercept Daryoosh's calls in authorization number three and also to intercept the appellant's calls under authorizations three and four.

4. Other alleged misrepresentations

67 It is not necessary to determine the extent to which misrepresentations with respect to the first authorization could be of consequence to the appellant's case since I am of the view that there is no merit to the appellant's contentions in this respect. Some of the matters raised do not amount to misrepresentations and to the extent that others may, none can be said to be material. The appellant also alleged that there were some misrepresentations or omissions with respect to the later authorizations. I find his argument equally without merit. I see no error in the trial judge's conclusion that there was no false or misleading disclosure and no material non-disclosure in the material before him.

5. Overbreadth

68 A general complaint was made before the trial judge and on this appeal about what was described as the overbreadth of the applications, and the authorizations, for intercepted communications. The trial judge indeed found that a number of names had been included in each authorization on the basis that they might be considered to be persons who were known to the investigative authority. In his view, this was done on the basis of a misreading of the requirement set out by the Supreme Court of Canada in *R. v. Chesson* (1988), 43 C.C.C. 353 (S.C.C.).

69 In *Chesson*, the Crown was precluded from relying on the intercepted communications of one of the two accused since her name had not been included in the authorization despite the fact that she was known to the authorities at the time. The Crown therefore could not rely on the reference to "unknown" persons under the basket clause of the

authorization. As noted by the trial judge in this case, *Chesson* does not stand for the proposition that any person who is known to the authorities must be named in the authorization. In *Chesson*, the police not only knew the identity of the accused in question at the time of the application but also knew that she had a specific connection and a relationship with one of the previously known targets. In the circumstances, prior authorization should have been sought before the interceptions of her calls could be used in evidence.

70 The trial judge concluded both with respect to the third and fourth authorizations that they "may have been overly broad and ought not to have included so many proposed targets." He concluded nonetheless that with respect to the appellant and the other accused before him that there was sufficient evidence upon which the authorizing judge could have issued the authorization. He therefore did not give any effect to this defect in the authorization.

71 The appellant relies on *R. v. Thompson* (1990), 59 C.C.C. (3d) 225 (S.C.C.) in arguing that the breach of third party rights is relevant to his application for the exclusion of evidence. In my view, the remedy sought by the appellant would constitute an unwarranted extension of the principles set out in *Thompson*.

72 In *Thompson*, the court in its majority judgment stated as follows at p.272:

> The Court of Appeal held in the case at bar that the appellants have no standing to raise the rights of third parties which might be affected by interception of communications at public pay telephones... In my view, the extent of invasion into the privacy of these third parties is constitutionally relevant to the issue of whether there has been an "unreasonable" search or seizure. To hold otherwise would be to ignore the purpose of s.8 of the *Charter* which is to restrain invasion of privacy within reasonable limits. A potentially massive invasion of the privacy of persons not involved in the activity being investigated cannot be ignored simply because it is not brought to the attention of the court by one of those persons. Since those persons are unlikely to know of the invasion of their privacy, such invasions would escape scrutiny, and s.8 would not fulfil its purpose.

73 The court goes on to note that in any authorization there is the possibility of invasion of privacy of innocent third parties and then states as follows:

> In my view, in some cases the possibility of invasion of privacy of innocent persons may become so great that it requires explicit recognition along with the interests of the investigation of crime. A "resort to" clause creates just this possibility if among the places resorted to are telephones frequently used by the general public or other such places. I do not mean to suggest that there should be a constitutional prohibition of intercepting communications at places frequented by the public; in that case drug importing conspiracies could virtually insulate themselves from perhaps the only effective investigative technique against them merely by using public places to conduct their business.

The Court was of the view that, in the circumstances of the case at hand, the authorization ought to have provided that conversations at a public telephone were not to be intercepted unless there were reasonable and probable grounds for believing that a target was using the telephone at the time that the listening device was activated. The failure to impose such a condition rendered the search potentially unreasonable. In the result, the court held that "any evidence obtained as a result of interceptions at pay telephones in the absence of reasonable and probable grounds for believing that a target was using the telephone was obtained in contravention of s. 8."

74 Even if the same reasoning were to be followed in this case, it would only result in the potential exclusion under s.24(2) of any evidence obtained as a result of the interception of calls of persons not properly included in the authorization. This would not assist the appellant and it is not the remedy that he seeks. What he is seeking in effect is a finding that the authorizations were too broad and hence, that they infringed upon the rights of third parties so as to taint the whole investigation and render the search unreasonable even with respect to those persons properly included in the authorization. In my view, such a conclusion would not be supported in law and the trial judge was correct in refusing to give effect to this argument.

C. Conclusion

75 In the result, the trial judge was correct in reaching the conclusion that the appellant's s.8 *Charter* rights had not been breached. Consequently, the evidence of the intercepted calls was properly admissible. This ground of appeal fails.

III. Failure to Read the Transcripts of the Communications in Court

A. The Issues Raised

76 The second ground of appeal against conviction pertains to the manner in which the intercepted communications were introduced into evidence. Most of the communications recorded on tape were in the Farsi language. The communications were therefore translated into English and transcripts in the English language were prepared. Both the tapes and the transcripts were then filed as exhibits during the course of the trial and left with the jury during its deliberations. Although parts of the tapes were played, and the corresponding parts of the transcripts were read, in open court, this evidence was never presented in its entirety in open court either by the playing of the tapes in full, or by the reading of the transcripts from beginning to end.

77 Although counsel for the appellant at trial (not counsel on appeal) took the position that the tapes had to be played for the jury, counsel on appeal argues that the judge erred by not requiring that the English transcripts of the intercepted communications be read in full to the jury. Firstly, the appellant argues that, by reason of the manner in which this evidence was presented, he was denied a coherent and complete presentation of the case against him. Secondly, he contends that since all of the transcripts were not read to the jury, much of the presentation of the Crown's case occurred in his absence in breach of his right to be present throughout his trial. As a corollary to the latter argument, he states that, since he spoke no English and could not read the transcripts himself (although he did listen to the tapes on his own), he effectively never heard the evidence against him which was relied upon by the jury in arriving at its verdict.

78 It is important to relate in some detail what transpired during the course of the trial in order to dispose of these issues.

B. The Facts

79 There is no issue between the parties with respect to the fact that the appellant's knowledge of the English language is limited and that he required the services of a Farsi interpreter for his trial. An interpreter was so provided and no issue has been raised as to the quality of the interpretation during the course of the proceedings.

80 As indicated earlier, the Crown's case against the appellant consisted mainly of intercepted private communications. Since most of the communications were in the Farsi language, the Crown not only tendered the original and composite tapes but also English translations of the communications in the form of transcripts. A number of witnesses were called to testify with respect to the interception, recording, translation and proof reading of the evidence being tendered. Crown counsel tendered 13 intercepted communications into evidence in the form of both tapes and transcripts. Parts of the tapes were played and the corresponding parts of the transcripts were read in the process of introducing this evidence. The tapes and the transcripts were filed as exhibits.

81 After Crown counsel completed his examination-in-chief of his last witness, Constable Ansari, he requested permission from the court to have the Registrar read the entire transcripts into the record. The trial judge responded that he did not think it was necessary to proceed in that way since the transcripts as filed were part of the evidence. The trial judge then asked defence counsel whether he wanted the transcripts read into the record. The appellant's trial counsel took the position that the tapes constituted the evidence and the transcripts were nothing more than an aid. He indicated to the judge that he knew of no authority which would allow for the introduction of the transcripts without the hearing of the tapes. He was therefore of the view that the tapes had to be played in open court "so my client can hear it and he can have this officer confirm that this is the tape that he heard, that's been placed onto the composite that has been tendered as an exhibit, and that it's an accurate translation that appears before you". The trial judge responded to defense counsel by saying that the appellant could listen to the tapes overnight because no one else was interested in hearing them.

82 The appellant's trial counsel then indicated to the trial judge that he wished to introduce two volumes of transcripts himself and took the position that the tapes had to be played with respect to these as well. He estimated that it would take approximately 30 to 40 hours to play the communications all in the Farsi language. The Crown indicated that it was prepared to admit the accuracy of the transcripts sought to be introduced by defence counsel without having the tapes played. As far as Crown counsel was concerned, it was not necessary to play the tapes in court so long as defence counsel had no intention of arguing that the case had not been proved by the Crown by reason of the tapes not having been played.

83 At this point, defence counsel sought leave to confer with his client and did so. He then asked the trial judge to defer this issue until later in the trial. He indicated that he was prepared to proceed with the cross-examination of the Crown's last witness (whose testimony dealt extensively with the accuracy and reliability of the transcripts) with the understanding that the Crown would have the opportunity later in the trial to either play the tapes or read in the transcripts depending on the judge's ruling on the issue. The trial judge made it clear to defence counsel that he could have access to the tapes during the cross-examination to clarify any disputed points but "that does not include the unbridled right to just simply play the whole tape."

84 Defence counsel proceeded to cross-examine Constable Ansari, during the course of which he introduced 2 volumes of transcripts of intercepted calls, which included the conversations already introduced by the Crown. The conversations filed by the defence were admitted by the Crown to be accurate English translations of the original communications in Farsi.

85 Following Constable Ansari's testimony, the Crown closed its case. The defence moved for a directed verdict (on other grounds). The motion was denied. The defence called no evidence and the question of playing the tapes or reading the transcripts in their entirety was never revisited by anyone. In his closing address to the jury, Crown counsel reviewed the calls tendered into evidence by him at length, reading relevant extracts from the calls to the jury. The appellant's trial counsel also reviewed many of the communications at length during the course of his address. He also made the following comment to the jury:

> Mr. Shayesteh is desperately asking you to read these transcripts cover to cover. We didn't do it in front of you here. We could have. We could have. Could have had every word read aloud. And it would have probably bored you to tears, because there's a lot of stuff in there that's irrelevant — there's no question about that — except that it provides a context for some of the calls that the Crown apparently considers to be relevant.

86 In his charge to the jury, the trial judge instructed the jury that the tapes constituted the evidence and that although they had not heard all of them during the course of the trial, if they wanted to hear any of the calls in Farsi, they were entitled to do so and equipment was made available for this purpose. He also instructed them on some of the frailties of the translation as uncovered during the course of the trial and he told them that it was up to them to judge the reliability of the disputed translation. No issue is raised with respect to the instructions to the jury.

C. Analysis

1. Coherent and complete presentation of the case against the appellant

87 Although the appellant confines his argument to the use that was made of the transcripts at trial, his submissions must be considered in the context of what transpired at trial. Since questions were raised by trial counsel as to the use which should be made of both the tapes and the transcripts, it may be useful to consider the appropriate approach to the introduction of intercepted communications during the course of a trial in a more general way, assuming of course their admissibility.

88 This question was considered to a certain extent by this court in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.) when an issue was raised as to the propriety of leaving transcripts of intercepted communications with the jury. The court stated as follows at p.47:

> It is true that the tapes themselves constitute the evidence which should be and must be considered by the jury. It is the tapes which will demonstrate not simply the words spoken by an accused or co-conspirator, but also the emphasis given to particular words and phrases and the tone of voice employed by the participants during the intercepted conversations. Upon hearing the tape, the jocular exclamation will be readily distinguishable from the menacing threat of violence. The tapes may provide cogent and convincing evidence of culpability or equally powerful and convincing evidence of innocence.

Accepting that the tapes constitute the evidence, the court held that it was nonetheless appropriate in many instances that the transcripts of the communications not only be read while the tapes were being played but that they be retained by the jury during its deliberations. In accordance with the principles in *Rowbotham*, the extent to which transcripts will be used during a trial will depend on the particular circumstances and is a matter of discretion for the trial judge.

89 It is clear that the principles in *Rowbotham* were enunciated in the context of communications conducted in a language understood by the triers of fact. This is referred to expressly in the judgment when, in summarizing the procedure that ought to be followed, the court stated a number of propositions, at p. 49, two of which are as follows:

> 1. In all cases, the instructions to the jury should emphasize that *if the conversation has been held in an official language*, it is the tape which constitutes the evidence that should be considered in reaching their verdict. It is the tape which reproduces not only the words spoken, but the manner and tone in which they were uttered.
>
> 2. *Where the communication has been held in an official language* the jury must be provided with the necessary equipment to play the tape as often as they may require during their deliberations. (emphasis added)

. . . . .

90 In order to determine what method of proof should be adopted when an oral communication is conducted in a language which is foreign to the triers of fact, it may be useful to go back to some basic principles.

91 The oral communication itself is the fact which is sought to be proven in evidence. When considering any proposed method of proof, the old principle known as the "best evidence rule", in my view, can still provide a useful starting point. The rule may be used, not so much as a criterion for determining questions of admissibility and exclusion with respect to any item of evidence sought to be adduced, but as a general guide for choosing the appropriate method of proof. The parties (usually the Crown) should endeavour to put forth the best evidence "that the nature of the case will allow" (Halsbur, 17 Hals., 4th ed., pp.8-9. para. 8) for consideration by the triers of fact. Such evidence can then be supplemented by secondary evidence to the extent that such secondary evidence remains relevant. What particular use will be made of the evidence during the course of the trial then becomes essentially a matter of discretion for the trial judge depending on the particular circumstances of any given case.

92 This court considered the best evidence rule and its application in the context of wiretaps in *R. v. Swartz* (1977), 37 C.C.C. (2d) 409 (Ont. C.A.) where an issue was raised as to the admissibility of re-recordings of intercepted communications. The court stated as follows, at pp. 410-411:

> It was argued that the re-recordings proffered were inadmissible as not being the best evidence of the conversations they reproduced. However, counsel made the significant admission that no question was raised as to the authenticity of the re-recordings.
>
> Of the "best evidence" rule Halsbury states in 17 Hals., 4th ed., pp. 8-9, para. 8:

> That evidence should be the best that the nature of the case will allow is, besides being a matter of obvious prudence, a principle with a considerable pedigree. However, any strict interpretation of this principle has long been obsolete, and the rule is now only of importance in regard to the primary evidence of private documents. The logic of requiring the production of an original document where it is available rather than relying on possibly unsatisfactory copies, or the recollections of witnesses, is clear, although modern techniques make objections to the first alternative less strong.

The rule itself, in its relatively modern form, did not absolutely exclude secondary evidence. It is stated by Lord Esher, M.R., in *Lucas v. Williams & Sons*, [1892] 2 Q.B. 113 at p. 116:

> "Primary" and "secondary" evidence mean this: primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better evidence.

Lord Denning would remove the question of secondary evidence entirely from the area of admissibility to that of weight. In *Garton v. Hunter*, [1969] 2 Q.B. 37 at p. 44 he said:

> It is plain that Scott L.J. had in mind the old rule that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded. That old rule has gone by the board long ago. The only remaining instance of it that I know is that if an original document is available in your hands, you must produce it. You cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility.

However, the counsel of prudence mentioned by Halsbury accords with the principle stated by *McCormick's Handbook of the Law of Evidence*, 2nd ed. (1972), p. 571:

> If the original document has been destroyed by the person who offers evidence of its contents, the evidence is not admissible unless, by showing that the destruction was accidental or was done in good faith, without intention to prevent its use as evidence, he rebuts to the satisfaction of the trial judge, any inference of fraud.

The same principle should apply to tape recordings.

The court then went on to find that the Crown had met its onus in this case and that the trial judge had been correct in admitting the "re-recordings" in evidence. The above-noted excerpt was subsequently adopted by the Supreme Court of Canada in *R. v. Cotroni* (1979), (sub nom. *R. v. Papalia*) 45 C.C.C. (2d) 1.

93 Many authors point out that, while the best evidence rule served to express an important fundamental principle upon which many of the earlier rules of evidence were based, it is of little practical application today. For example, the following is stated in *Phipson on Evidence*, 14th ed. (1990), p.117:

> The maxim that "*The best evidence must be given of which the nature of the case permits*," has often been regarded as expressing the great fundamental principle upon which the law of evidence depends. Although, however, it played a conspicuous part in the early history of the subject the maxim at the present day affords but little practical guidance. Indeed the Division Court [in *Kajala v. Noble* (1982) 75 Cr. App. R. 149] has described it as having gone by the board long ago.

Professor Ronald Delisle, in *Evidence, Principles and Problems*, 4th ed. (1996), discussed the impact of the best evidence rule in the context of documentary evidence as follows, at p.260:

> In contrast to the above rules which *facilitate* the proof of a document there is a rule which *requires* that, when the terms of a document are material, proof of the terms of the document must be by production of the original. [...]

> Some text-writers in the nineteenth century spoke of a wider best evidence rule applicable to *all* forms of evidence which *required* the best evidence that could be given and also *allowed* the best evidence that could be given. Thayer described this as "an old principle which had served a useful purpose for the century while rules of evidence had been forming and [...] was no longer fit to serve any purpose as a working rule of exclusion." Restricting the rule's use to documents, perhaps jettisoning its use completely in favour of the name "documentary originals rule," would bring needed clarity. As opposed to a general rule of exclusion for the other forms of real evidence, we would have then simply the application of common sense that the failure to produce the best evidence available to the proponent might yield a distrust for the evidence that was produced.

94 In any case where intercepted communications have been taped, whatever the language of the communications, the tapes constitute the best evidence since they are the closest thing to the particular fact which the party is seeking to prove. As stated earlier, the objective ought to be to produce the best that the nature of the case will allow. Hence the tapes should be produced and filed in evidence (when of course otherwise admissible) whether the communications are in one of the two officiai languages or in any other language because the tapes will generally constitute the best evidence available. This should be viewed simply as a proposition of common sense rather than any strict application of a rule of evidence.

95 The extent to which other secondary evidence should be ruled *inadmissible* where the best evidence is *not* produced (in accordance with the principles enunciated in *Swartz*) is not an issue on this appeal. In this case, the tapes were produced and filed in evidence. It may well be that, in light of new developments in the law of evidence which tend to favour greater admissibility of relevant evidence, the unavailability of the tapes may be regarded as a matter going to the weight of the secondary evidence as opposed to its admissibility. This issue does not arise in this case. However, it should be made clear that the production of the best evidence, usually in the form of tapes, does not serve to exclude additional secondary evidence. Secondary evidence will still be admissible to the extent that it remains relevant. Some secondary evidence will be inadmissible, not because it is secondary in nature, but because it is irrelevant. It may become redundant in light of the best evidence adduced together with other secondary evidence.

96 Secondary evidence in some form or another will almost invariably be necessary to assist the trier of fact in understanding the primary evidence and its full impact even in cases where the communications are held in a language understood by the triers of fact. For example, evidence of voice identification is quite commonly introduced to assist the trier of fact in identifying the parties to the communication. As well, the quality of the tape is often such that a transcript, which has been prepared by a person who has repeatedly listened to the tape, may provide useful assistance to the trier of fact who is attempting to decipher the message upon hearing the communication for the first time.

97 Secondary opinion evidence may also be introduced to assist in the interpretation of a particular code used by the parties to the communications and known only to persons with some expertise in the subject-matter. Where the communications are in a foreign language, secondary opinion evidence in the form of a translation becomes essential for the effective presentation of the evidence. Again, the nature of the secondary opinion evidence and the extent to which it be admissible to assist the triers of fact will depend on the circumstances of each particular case.

98 In this case, it is quite clear, and uncontested, that both the tapes and the transcripts were properly introduced into evidence.

99 The admissibility of the best (or primary) evidence and of the secondary evidence is a separate issue from the use which will be made of it during the course of the trial. The latter is a matter of discretion for the trial judge and will depend on the evidential value of the evidence in question. As stated in *Rowbotham*, where the communications are in an official language the tapes should be played before the jury during the course of the trial and left with them during their deliberations with the necessary equipment to play them.

100 Where the communications are held in a language foreign to the triers of fact, the tapes still constitute the best evidence and should be produced and filed in evidence. To the extent that the tapes may still have evidential value, they

should also be played for the jury. Even though the language may not be understood by the triers of fact, hearing the tapes may still be useful in assessing the tone used, in testing the accuracy of the transcripts or translations, in presenting voice identification evidence etc. Whether or not the tapes of communications in a foreign language will be played for the jury during the course of the trial and, if so, to what extent, is a matter of discretion for the trial judge. It is also a matter of discretion whether the tapes of the foreign communications should be left with the jury during its deliberations. This discretion, of course, must be exercised judicially with consideration given to the position taken by both Crown and defence on this issue.

101 Where the communications are in a foreign language, secondary opinion evidence in the form of a translation will be essential to the trier of fact. It may be introduced directly by *viva voce* testimony or by way of a transcript introduced by appropriate *viva voce* evidence or by admission. In cases where the translation takes the form of a transcript, the transcript should be filed into evidence. The extent to which the transcript should also be read during the course of the trial and/or left with the jury during its deliberations depends on the particular circumstances of the case. The trial judge should always consult both Crown and defence in the determination of this matter and ensure that each party has an opportunity to fully and adequately present its case. In many cases, one would expect that the most effective manner of presenting evidence of communications in a foreign language would be through the reading of the transcript of the translation. However, there is no rule of evidence requiring that a transcript, once filed into evidence, must also be read. Again it a matter of discretion for the trial judge.

102 In this case, the tapes were made available to the appellant and his counsel long before the trial and counsel for the appellant has conceded that his client has listened to them. The tapes were then presented as evidence and filed as exhibits. Counsel were at full liberty to play any part of the tapes they believed was necessary to clarify any disputed point and indeed parts of the tapes were played for the jury during the course of the trial. There is no evidence that the tapes were not played to the fullest of their evidential value in the context of this trial. The reasons advanced by defence counsel at trial in support of his request that the tapes be played in court were unconvincing. The playing by rote of many hours of tapes in a foreign language not understood by the triers of fact, as suggested by defence counsel at trial, would have amounted to a totally meaningless exercise for the triers of fact and would not have contributed in any way to the presentation of a full answer and defence. The tapes were also made available to the jury during its deliberations together with the necessary equipment for their playing and appropriate instructions from the trial judge.

103 In my view, the trial judge appropriately exercised his discretion as to the use which should be made of the tapes in the context of this trial. Indeed, the appellant is no longer arguing on this appeal, as he did at trial, that the tapes should have been played. The complaint now pertains to the failure to read the entire transcripts in open court.

104 It is very difficult for the appellant to argue that the trial judge improperly exercised his discretion in failing to have the entire transcripts read in to the record when this position was not advanced by him at trial. As noted earlier, it is Crown counsel who had initially requested that the transcripts be read into the record. When defence counsel at trial was asked by the trial judge whether he wanted the tapes played, the transcripts read in or both, he clearly indicated that it was the tapes that he wanted played. Then, as set out earlier, defence counsel asked that the issue be deferred and he appeared content to carry on without the tapes being played or the transcripts read. In the end result, most of the transcripts introduced by the Crown, and many introduced by the defence were in fact read during the course of the presentation of the evidence and were again read extensively during the course of both counsel's addresses.

105 In all the circumstances, I find no merit in the appellant's contention that he was "denied a coherent and complete presentation of the case against him" as contended. I am not satisfied that the trial judge improperly exercised his discretion with respect to the use which should be made of the transcripts at trial.

106 The next question raised is whether the failure to read the whole of the transcripts in open court in any way transgressed the accused's right to be present during the whole of his trial and his corollary right to understand the proceedings.

2. Accused's right to be present throughout his trial

107 Section 650 of the *Criminal Code* provides that, subject to certain specified exceptions, "an accused other than a corporation shall be present in court during the whole of the accused's trial." The rationale behind this requirement was succinctly set out by Martin J.A. in *R. v. Hertrich* (1982), 67 C.C.C. (2d) 510 (Ont. C.A.) at 537 as follows:

> The essential reason the accused is entitled to be present at his trial is that he may hear the case made out against him and, having heard it, have the opportunity of answering it: *R. v. Lee Kun* (1915), 11 Cr. App. R. 293. The right of the accused to be present at his trial, however, also gives effect to another principle. Fairness and openness are fundamental values in our criminal justice system. The presence of the accused at all stages of his trial affords him the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result of the trial. The denial of that opportunity to an accused may well leave him with a justifiable sense of injustice. Indeed, in my view, an examination of the Canadian decisions shows that the latter principle is, in fact, the implicit and overriding principle underlying those decisions.

108 The case law is clear that an accused does not need to demonstrate any actual prejudice flowing from his or her exclusion from the trial in the sense that he or she was impeded in his or her ability to make full answer and defence. It is enough that an accused was excluded from a part of the trial which affected his or her vital interests in order to constitute a violation of the right to be present under s.650 of the *Criminal Code*: [see *Tran. supra: R. v. Meunier* (1965), 48 C.R. 14 (Que. C.A.). aff'd [1966] S.C.R. 399; *R. v. Reale* (1973), 13 C.C.C. (2d) 345, aff'd [1975] 2 S.C.R. 624; *Hertrich, supra*; and *R. v. Grimba* (1980), 56 C.C.C. (2d) 570 (Ont. C.A.)].

109 It is also well established that more than mere physical presence at a trial is required to satisfy this provision. Of particular relevance to this appeal is an accused's corollary right to understand the language of the proceedings. The case law has long recognized that an accused has the right to be "present" in the sense of being able to understand the language of the proceedings: see *R. v. Tran*, [1994] 2 S.C.R. 951 for a review of the relevant jurisprudence. The right to an interpreter is now constitutionally entrenched in s. 14 of the *Charter*:

> A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Section 14 was raised for the first time before the Supreme Court of Canada in *R. v. Tran.* The Court made the following general comment with respect to an accused's right to the assistance of an interpreter at p.975:

> It is clear that the right to the assistance of an interpreter of an accused who cannot communicate or be understood for language reasons is based on the fundamental notion that no person should be subject to a Kafkaesque trial which may result in loss of liberty. An accused has the right to know in full detail, and contemporaneously, what is taking place in the proceedings which will decide his or her fate. This is basic fairness. Even if a trial is objectively a model of fairness, if an accused operating under a language handicap is not given full and contemporaneous interpretation of the proceedings, he or she will not be able to assess this for him or herself. The very legitimacy of the justice system in the eyes of those who are subject to it is dependent on their being able to comprehend and communicate in the language in which the proceedings are taking place.

The appellant has not alleged any violation of his *Charter* rights. He founds his argument on his statutory right to be present at this trial.

110 I find no merit to the appellant's first contention that, since the whole transcripts were not read to the jury, the presentation of the Crown's case largely occurred in his absence in breach of his right to be present at his trial. The evidence of the intercepted communications was properly introduced, in accordance with the law, during the course of the proceedings and the accused was present throughout these proceedings. He also had the benefit of an interpreter

throughout the course of the proceedings and there is no evidence that there was any language difficulty with respect to anything that took place in the courtroom.

111 The appellant's last argument, which is also related to his right to understand the proceedings, causes more concern. In his factum, he states that since he "spoke no English and could not read the transcripts himself, he never heard the evidence against him *involving calls to which he was not a party*" (emphasis added). It is undisputed that the tapes have been available to the appellant since long before the trial and it was conceded at the hearing of the appeal that he had listened to them. However, counsel for the appellant argues rather that, since the English transcripts were not read out in their entirety during the course of the trial and translated back to the appellant in Farsi by the court interpreter in open court, the appellant never heard the evidence against him which was relied upon by the jury to convict him.

112 There is no doubt that the right to understand the language of the proceedings with its attendant right to an interpreter includes the right to understand the language of any written material which forms part of the proceedings and this, depending on the circumstances, may well include the right to obtain a translation of the written material. Otherwise, the right of an accused may be hollow indeed. One need only think for example of a fraud case where the bulk of the evidence would consist of documentary evidence in a language foreign to an accused. If this evidence were not translated for the accused, he or she would not be able to understand the proceedings. In such a situation, it could well be said that a good part of the proceedings took place in his or her absence within the meaning of s.650 of the *Criminal Code*. The appellant urges this court to arrive at the same conclusion in this case. Counsel for the appellant argues that although his client heard the tapes in the Farsi language and in this sense was able to understand the evidence, for all intents and purposes the "evidence" for the jury was not the tapes but the transcripts. It was therefore incumbent upon the trial judge to have those transcripts read in court and translated back into the Farsi language for the appellant during the course of the trial.

113 In the particular circumstances of this case, the appellant's complaint boils down to a question of translation. In my view, his contention that he was not afforded the opportunity to "hear" or understand the evidence as introduced through the transcripts in the English language, when considered in the light of what transpired at trial, is not credible. The following circumstances are of particular relevance.

114 It is clear that the appellant's trial counsel was aware of the importance of giving the appellant an opportunity to hear the tapes and compare them with the translation provided by the Crown since this matter was discussed earlier in the trial between counsel and the trial judge prior to the introduction of the evidence (volume 5 pp.999-1001). It is therefore noteworthy that one week later, when the time came to introduce the evidence, trial counsel did not raise this issue but requested rather that the tapes in the Farsi language be played in court. Of course, the playing of the tapes as requested would not have assisted the appellant in understanding the English transcripts. No issue was raised as to the appellant's understanding of the English transcripts. Indeed, counsel at trial indicated that he was ready to cross-examine as to the accuracy of the transcripts and asked that the issue of playing the tapes (or reading the transcripts, as was requested by the Crown) be deferred.

115 The accuracy of the English translation was fully canvassed during the course of the trial and no issue is raised in this respect. There is no issue raised as to the presence of the court interpreter during the course of the entire proceedings or as to the quality of the interpretation. No allegation of the appellant's *Charter* rights in this respect has been raised. One can only conclude, in the circumstances of this case, that the appellant was provided with an appropriate translation of the English transcripts in *his* language, in the form of the actual tapes in the Farsi language.

D. Conclusion

116 Consequently I would not give effect to this ground of appeal. In the result, I would dismiss the appeal from conviction.

IV. Appeal as to Sentence

117 The appellant raises disparity as the basis for appealing his sentence. He argues that the trial judge erred in sentencing the appellant to the same term of imprisonment, 8 years, as that imposed on his co-accused given the appellant's 15 months spent in pre-trial custody as compared to the co-accused's 4 months.

118 In my view, the appellant has failed to show any error by the trial judge. The sentence was a fit one. I would therefore dismiss the appeal as to sentence as without merit.

Appeal dismissed.

TAB 4

CITATION: Al Masri v. Baberakubona, 2010 ONSC 562
COURT FILE NO.: 06-CV-827400-CM
MOTION HEARD: 2009-10-05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SANA'A AL MASRI, Plaintiff

AND:

CHRISTINE BABERAKUBONA, Defendant

BEFORE: Master LouAnn M. Pope

COUNSEL: Allen Blemmings, for the Plaintiff

Leslie Albert, for the Defendant

HEARD: October 5, 2009

REASONS FOR DECISION

[1] The defendant seeks an order for security for costs against the plaintiff pursuant to Rule 56.01(1)(a). At the time this motion was heard, the plaintiff resided in Kuwait. There appears to be no dispute that the plaintiff resides in Kuwait permanently notwithstanding that she resided in Windsor, Ontario at the time of the accident in question.

[2] In January 2004 the plaintiff was injured in a motor vehicle accident that occurred in Windsor, Ontario. She alleges that the accident was caused by the defendant's failure to stop at a posted stop sign. She claims to have sustained serious and permanent personal injuries as a result of the accident including injuries to her neck, back, legs, hands that require ongoing medical treatment. She also claims economic losses including past and future lost income and losses as a result of her inability to perform household chores.

[3] Although this action was commenced in December 2006, it has not proceeded to discoveries. The plaintiff permitted a waiver of defence that was ultimately delivered on January 8, 2008. Plaintiff's counsel cancelled discoveries scheduled for May 15, 2008 because the plaintiff had not returned to Canada. At the time of this motion, discoveries had not been rescheduled. In fact, plaintiff's counsel was unable to locate his client for an extended period of time; however, he finally made contact with her in or about June 2009.

The Plaintiff's Evidence

[4] The plaintiff filed the affidavit of David Wylupek in response to this motion. Mr. Wylupek is a partner with the firm Katzman, Wylupek LLP who are solicitors of record for the plaintiff; however, Patrick Sonoski, a lawyer with that firm, has represented the plaintiff since the commencement of the action. Mr. Wylupek swore to the facts set out in his affidavit based on his information and belief; namely, information from the plaintiff and Patrick Sonoski.

[5] The liability-related evidence is limited to the allegations in the statement of claim and the police report. While the plaintiff produced a medical report and medical records to the defendant, those documents did not form part of the evidence on this motion.

[6] The majority of the evidence relates to the plaintiff's financial situation set out in paragraphs 14 through 24 of the affidavit. When the plaintiff lived in Canada, her sole means of support was derived from welfare. In September 2009 when Mr. Wylupek swore his affidavit, the plaintiff's source of income was derived solely from her husband's income, which was $5,000 per month. She had two bank accounts at RBC Royal Bank and CIBC with balances of approximately $400 and $100 respectively. A computer-generated statement of the RBC Royal Bank "savings" account shows a loan payment made on September 23, 2009 of $400. On September 18, 2009 the statement shows a deposit made to the account of $376.32 from "Fed-Prov/Terr-Canada." The computer-generated statement of the CIBC "chequing" account shows a balance on July 31, 2009 of $156.81 and a balance on August 31, 2009 of $155.56 after deduction of a service charge of $1.25.

[7] The plaintiff has five children who are all dependent. Her monthly expenses consist of $800 for rent, plus utilities, food, clothing, car lease and insurance. The plaintiff's husband is required to pay tuition for her son at Gulf University of $20,000 per year and tuition for her younger son of $5,000 per year. She has a RBC Royal Bank credit line that has a limit of $10,000 and as of September 23, 2009 she owed $6,037.91. A computer-generated printout of the line of credit shows three payments made to reduce the balance between August 10, 2009 and September 23, 2009 that totals $1,600.00. In comparing the RBC Royal Bank savings account statement with the credit line statement, it appears that the $400 payment to the credit line on September 23, 2009 came from the savings account that same day as the descriptive entry numbers match.

[8] Neither the plaintiff nor her husband owns any property in Canada or Kuwait. They do not have the resources or the ability to borrow money to pay security for costs and if ordered to pay security for costs, she will not be able to continue her claim in this action. Further, it is Mr. Wylupek's evidence based on Patrick Sonoski's belief having reviewed the police report and medical evidence that the plaintiff has a meritorious claim.

The Law

Rule 56.01(1)(a)

[9] This motion is brought pursuant to Rule 56.01(1)(a) which reads as follows:

> 56.01(1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> (a) the plaintiff or applicant is ordinarily resident outside Ontario;

[10] It is undisputed that the plaintiff ordinarily resides outside of Ontario.

[11] The rule is discretionary such that a court may order security for costs where a plaintiff ordinarily resides outside of Ontario. The plaintiff bears the burden of showing good reason why the order should not be made. For example, she must show that it is unnecessary for an order to be made because she has sufficient assets in a reciprocating jurisdiction to satisfy any costs order against her. Conversely, she must prove that she is impecunious and special circumstances exist that make it just that no security or nominal security be ordered. I will now consider the relevant factors on this issue.

Merits of the Action

[12] The plaintiff must adduce evidence as to whether she is likely to succeed in the action. This action arose as a result of a motor vehicle accident that occurred on January 11, 2005. In order to recover damages for pain and suffering, the plaintiff must satisfy what is commonly referred to as the "verbal threshold" pursuant to the provisions of section 267.5(5) of the *Insurance Act*, R.S.O. 1990, s. I.8, as amended; that is, that she sustained a permanent serious disfigurement or permanent serious impairment of an important physical, mental or psychological function as a result of the accident. In her action the plaintiff also claimed damages for economic loss, which courts have held are not subject to the verbal threshold. As such, even if she cannot prove that her injuries meet the verbal threshold, she may still be entitled to damages for economic loss.

[13] It is likely that liability for the accident will not be in issue. Upon review of the motor vehicle accident report, the defendant failed to stop at a posted stop sign and collided with the plaintiff's vehicle. However, there is no evidence of a formal admission of liability by the defendant.

[14] The plaintiff claims to have sustained injuries to her neck, back, legs and hands in the accident. Although she delivered a medical report and medical records to the defendant in September 2008, those documents do not form part of evidence on this motion. Therefore, there is no basis for this court to be able to assess the plaintiff's likelihood of success for damages in this action.

Best Evidence Rule

[15] The defendant submits that the plaintiff failed to put forth her best evidence on this motion. Mr. Wylupek is not the solicitor for the plaintiff. He is one of the lawyers in the offices of Katzman Wylupek LLP. Mr. Sonoski of that office has represented the plaintiff since the action was commenced. As such, it is submitted that based on the best evidence rule, the plaintiff should have filed an affidavit of the plaintiff rather than a lawyer who has no direct knowledge of the circumstances of the plaintiff. It is further argued that the affidavit contains hearsay evidence and it lacks preciseness and important facts. Lastly, it is submitted that given the best evidence rule and the fact that it is a contentious issue as to whether the plaintiff will be able to continue her claim in this action if security for costs is ordered, a blanket statement made by Mr. Wylupek on this issue is simply not enough in these circumstances. The defendant references paragraph 24 of Mr. Wylupek's affidavit wherein he states that the plaintiff will not be able to continue her claim for injuries suffered in the accident should an order be made.

[16] The defendant relies on the case of *Wiley, Lowe & Co. v. Gould*, [1958] O.W.N. p. 316 (H.C.J.), where the Court of Appeal upheld the lower court's decision to refuse to admit affidavits filed in support of the motion to set aside an ex parte order for substituted service of a writ of summons on Reva Gould, wife of the co-defendant. The court found that the affidavits, which were made by solicitors and one by a student, contained "hearsay upon hearsay" evidence. The defendants gave no reason for not filing an affidavit by the defendant. The lower court refused to admit the evidence on the principle that it was discretionary under the Rules of Civil Procedure to receive affidavits on information and belief and that this was a case where the best evidence rule should be insisted on.

[17] The defendant also relies on the case of *Re Becker*, [1986] O.J. No. 2980 (Surr.Ct.) where that court struck out portions of an affidavit filed on an application based on its finding that the impugned paragraphs were contentious within the meaning of rule 39.01(5) and therefore could not be deposed to on the basis of information and belief as it was tendered for the truth of the memorandum.

[18] While the defendant is not seeking to strike out the Affidavit of Mr. Wylupek, it is submitted that given the lack of evidence proffered by the plaintiff, the evidence filed is insufficient to meet the plaintiff's burden after a prima facie case for security for costs is made out.

Conclusion

[19] The plaintiff claims that she is impecunious. This is one of the factors to be considered by the court when exercising its discretion. It is a significant factor because courts are always concerned about a plaintiff's financial ability to proceed with the action should security for costs be ordered. For that reason, a plaintiff must do more than simply adduce some evidence. The evidence should come from the plaintiff herself as she has the best knowledge of her financial circumstances. It is established law on motions for security for costs that where a plaintiff uses impecuniosity as a shield against a costs order, details and convincing proof of impecuniosity must be presented. I am guided by

the decision of Quinn J. in *Morton et al. v. Canada (Attorney General)*, [2005] O.J. No. 948 (S.C.J.), para. 32, where he held the following:

> In motions of this nature, the financial evidence of plaintiffs must be set out with robust particularity. There should be no unanswered material questions, as is the case here. It is worth remembering that the financial status of the plaintiffs is known only to them. As I mentioned earlier, they bear the burden of proving the effect upon them of an order for security for costs. They failed to discharge that burden. Full financial disclosure is required and should include the following: the amount and source of all income; a description of all assets (including values); a list of all liabilities and other significant expenses; an indication of the extent of the ability of the plaintiffs to borrow funds; and, details of any assets disposed of or encumbered since the cause of action arose.

[20] If a plaintiff fails to demonstrate impecuniosity, the court may consider the merits of the plaintiff's case if an order for security for costs would have the effect of depriving the plaintiff of a bona fide cause of action. (See *Ren v. Weisdorf*, [2009] O.J. No. 1850 (S.C.J.), paras. 17-19.)

[21] I have come to the conclusion that the plaintiff has not provided satisfactory evidence of impecuniosity. I considered the following factors in reaching my decision:

(a) The plaintiff did not submit her own affidavit and there was no reason given for not doing so.

(b) The financial evidence is vague and it lacks particularity. There is no evidence or a lack of evidence regarding the following:

(i) source of all income including the plaintiff's husband's income including income tax returns filed in Canada and Kuwait for both the plaintiff and her husband. The plaintiff offers no explanation for the deposit of $376.32 on September 18, 2009 from "Fed-Prov/Terr-Canada." Similarly, there is no explanation for the source of three payments on the credit line of $1,600 between August 10, 2009 and September 23, 2009. A court cannot be left to speculate as to the source of these funds;

(ii) whether her husband's stated income of $5,000 monthly and the expenses for their sons' tuition is in Canadian or Kuwait currency;

(iii) bank accounts or investments, owned solely or jointly, in Kuwait;

(iv) substantiation for qualifying for a $10,000 credit line in Canada when she was on welfare;

(v) explanation why the plaintiff could not use the credit available on her credit line to satisfy all or part of a security for costs order;

(vi) the extent of her ability to borrow money and an explanation for an inability to borrow money. Her evidence is that ". . . neither she nor her family has the resources to post security for costs or does she have the ability to borrow money to post security for costs." The veracity of her evidence is in issue given her ability to obtain and make substantial payments on a credit line in Canada;

(vii) full particulars of her two sons for whom tuition is paid including their ages, names of educational institutions where both children attend, dates of attendance and documentary proof of payment of the expenses;

(viii) full particulars and amounts of all expenses.

[22] As such, I find that the plaintiff has not met her burden of proving impecuniosity; therefore, she has no defence against the order for security for costs.

[23] However, if a plaintiff fails to satisfy the burden of establishing impecuniosity, a court may consider the merits of the plaintiff's action and the likelihood of a cost order being made against the plaintiff after trial. In doing so, a court will be concerned whether an order for security for costs would prevent the plaintiff from continuing her action. For the reasons set out above, I am unable to make any finding regarding the strength of the plaintiff's case given the lack of evidence and the early stage of this action. Examinations for discovery have not taken place. Therefore, even if the plaintiff's medical report and medical records were tendered as evidence on this motion, it is too early in the case to assess its strengths and weaknesses. As such, I find that either party may succeed at trial. This is a neutral result.

[24] Therefore, as the plaintiff has not established impecuniosity, I order that the plaintiff pay security for costs.

[25] I must now determine the amount of the security to be paid. Defendant's counsel filed a Bill of Costs for the entire action, including the costs of this motion, for fees and disbursements that totals approximately $42,000. The Bill of Costs does not state whether the fees are based on a substantial indemnity rate. The plaintiff challenged the reasonableness of several entries on the Bill of Costs as being excessive.

[26] Rule 56.04 provides that the court with wide discretion in determining the amount and form of security and the time for paying:

> 56.04 The amount and form of security and the time for paying into court or otherwise giving the required security shall be determined by the court.

[27] Where an action is at an early stage, a court may make a pay-as-you-go order. Quinn J. in *Morton* held that:

> Despite the generous discretion available, where the need for security for costs is made out, the court, absent exceptional circumstances, should order security

> in the amount of the actual anticipated costs and not become weak-kneed at that prospect. This is not to say, however, that the full anticipated costs of the entire action must be ordered. Where an action is in its procedural infancy, with examinations for discovery yet to be scheduled, a pay-as-you-go order is usually the most appropriate one and I find that to be so here.

[28] In my view, this is an appropriate case for such an order. Therefore, the plaintiff shall pay into court the amount of $26,000, as follows:

(a) $7,000 by May 1, 2010. This represents the defendant's costs on a partial indemnity scale up to and including examinations for discovery of both parties and the completion of mediation. This amount does not include the costs of this motion, which I will consider separately.

(b) $3,000 after completion of mediation; and

(c) $16,000 after completion of the pre-trial conference.

Costs of the Motion

[29] The defendant was successful on this motion therefore she is entitled to her costs. Based on the Costs Outline, the defendant seeks costs of $3,403.50, which includes fees based on a substantial indemnity scale and disbursements. This amount does not include GST or the cost of photocopies. The Costs Outline is incomplete in that it contains no submissions to substantiate an award of costs on a substantial indemnity basis. In any event, I am not satisfied that this is an appropriate case to award substantial indemnity costs.

[30] Therefore, the plaintiff shall pay the defendant her costs of this motion based on a partial indemnity scale of $2,350.00, which includes GST and disbursements, payable by March 1, 2010.

"original signed by Master Pope"

Master LouAnn M. Pope

Date: January 25, 2010

Court File No. CV-12-9545-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 3113736 CANADA LTD., 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at **TORONTO**

BOOK OF AUTHORITIES OF THE APPLICANTS/MOVING PARTY
(Re Leave under Rule 39.02 and Adjournment Motions, Returnable November 29, 2018)

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