CIVIL APPEALS: THE YEAR IN REVIEW

RAPID FIRE

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RAPID FIRE TOPICS

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1. Jurisdiction – Forum of Necessity

Ibrahim v. Robinson, 2015 ONCA 21 (Weiler, Feldman and Benotto JJ.A.), dismissing an appeal from the order of Justice Steven Rogin of the Superior Court of Justice, dated February 21, 2014, affirming that Ontario has jurisdiction over an action as the forum of necessity.

Facts

The appellant was the defendant to a motor vehicle action commenced in Ontario. The accident occurred in Michigan in 2008. The respondent plaintiffs were Ontario residents, and the appellant was a Michigan resident. In a motion argued in 2013, the appellant moved to dismiss the Ontario claim against him for want of jurisdiction.

The appellant brought the motion to challenge Ontario's jurisdiction only after the limitation period in Michigan had expired. During the period between the date of the accident and the time the motion was heard, the Supreme Court released its decision in *Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572. Prior to that decision, Ontario may well have had jurisdiction over the respondents' claim; however, in light of *Van Breda* it was clear that Ontario lacked jurisdiction. The Supreme Court released its *Van Breda* decision several months after the Michigan limitation period expired, and a few months before the defendant challenged Ontario's jurisdiction.

The motion judge did not dismiss the action, relying on the "forum of necessity exception" referred to by the Court of Appeal for Ontario in *Van Breda*. He found that, since the appellant had delayed in bringing the jurisdiction motion until after the Michigan limitation period had expired, he may have lulled the respondents into a false sense of security. The motion judge concluded that fairness and access to justice for the respondents called for the court to assume jurisdiction based on forum of necessity.

Held: Appeal dismissed.

Reasons for decision

In the Court of Appeal's *Van Breda* decision (2010 ONCA 84, 98 O.R. (3d) 721), Sharpe J.A. recognized the "forum of necessity" doctrine. That doctrine permits Ontario to assume jurisdiction over a claim, absent a real and substantial connection between the claim and Ontario, where "there is no other forum in which the plaintiff can reasonably seek relief". The Supreme Court in *Van Breda* did not address the forum of necessity doctrine. After the motion judge's decision in this case, the Court of Appeal held in *West Van Inc. v. Daisley*, 2014 ONCA 232, 119 O.R. (3d) 481, leave to appeal refused, [2014] S.C.C.A. No. 236, at para. 37, that the expiry of the limitation period in the proper foreign forum does not make Ontario the forum of necessity.

As a result of the unique confluence of circumstances in this case, the motion judge did not err in holding that Ontario had jurisdiction as the forum of necessity. The three unique circumstances are: (1) when the action was commenced, there were likely sufficient

connecting factors for Ontario to assume jurisdiction on the basis of the then-existing common law real and substantial connection test; (2) the motion judge found that the appellant delayed in bringing the motion until after the Michigan limitation period expired, possibly lulling the respondents into a false sense of security; and (3) the law on assuming jurisdiction and on forum of necessity had changed prior to the motion, to the respondents' detriment.

The motion judge's discretionary decision should not be interfered with because it was based not only on the consideration that the Michigan limitation period has expired; it was also based on considerations of fairness and access to justice, including the fact that the change in the common law test for assumed jurisdiction occurred only after the expiry of the foreign limitation period.

Significance for Practitioners

- The forum of necessity doctrine described by the Court of Appeal in *Van Breda* remains available to parties as an exception to the real and substantial connection test where there is no other forum in which the plaintiff can reasonably seek relief.
- The court made it clear that if the motion judge had relied solely on the expiry of the Michigan limitation period as the reason for invoking the forum of necessity doctrine, then this court's comments in *West Van* "would speak strongly in favour of allowing the appeal" (at para. 13).
- Considerations of fairness and access to justice, including changes in the common law of the jurisdiction that detrimentally impact a plaintiff, are relevant to the availability of the forum of necessity doctrine.
- Stay tuned to the pending appeal in the Supreme Court of Canada in *Trillium Motor World v. General Motors of Canada Ltd.*, where that court may have occasion to clarify its decision in *Van Breda*.

2. Inherent Jurisdiction - Power to Order an Out-of-Province Hearing

Parsons v. Ontario, 2015 ONCA 158 (Juriansz, LaForme and Lauwers JJ.A), allowing in part an appeal from an order of the Superior Court of Justice (Winkler C.J.O., sitting as a justice of the Superior Court) dated June 28, 2013, with reasons reported at 2013 ONSC 3053, directing that the Ontario Superior Court judge supervising the 1986-1990 Hepatitis C Settlement Agreement has the discretion to sit with the supervising judges from British Columbia and Québec to hear motions arising under that agreement, in a location in or outside Ontario, without the necessity of a video-conference link to a court room in Ontario.

Facts

In the late 1990's, concurrent class proceedings were certified in Ontario, Québec, and B.C., on behalf of individuals infected with Hepatitis C through tainted blood. The Ontario class included Ontario residents and those of all other provinces and territories save B.C. and Québec. The proceedings led to a single national settlement agreement in 1999, supervised by judges of the superior courts of B.C., Ontario, and Québec. The settlement agreement provides that for an order relating to it to take effect, all three supervisory courts must come to substantially the same decision.

In 2012, class counsel in all three provinces brought a motion to extend the deadline for filing a first claim under the settlement agreement. All three supervisory judges were scheduled to be in Edmonton, Alberta in September 2012 for a meeting of the Canadian Judicial Council. Class counsel proposed that the motions should be heard at that time, in a joint hearing before all three judges, sitting in Edmonton. The Attorney General of Ontario ("AGO") objected to the Ontario supervisory judge (at the time, Winkler C.J.O.) sitting outside the territorial boundaries of the province. Class counsel in each province brought a motion for directions asking the supervisory judges to determine whether they had the jurisdiction to hold a joint hearing outside their respective provinces.

In Ontario, Winkler C.J.O. ruled that the inherent jurisdiction of the superior court enables it to hold a hearing out of province where the court has personal and subject-matter jurisdiction over the parties and the issues, and where doing so would promote the interests of justice. Winkler C.J.O. held that the power to hold an out-of-province hearing flows from the superior court's inherent jurisdiction to control its own process. He found that there is no constitutional, statutory or common law principle preventing the Ontario Superior Court from exercising its inherent jurisdiction in this manner.

Winkler C.J.O. noted that in the absence of a comprehensive legislative framework the courts must step in to settle the rules of practice and procedure in the class proceedings context. He emphasized that the joint hearing was an instance of interprovincial judicial cooperation intended to further access to justice and judicial economy.

Winkler C.J.O. rejected the AGO's suggestion that any joint hearing must be held by three-way video-conference, with each judge sitting in his/her respective home province, as

opposed to an in-person joint hearing. He noted that video-conferenced hearings do not offer the same advantages as an in-person hearing, and tend to involve technological glitches that disrupt the exchange between the bench and counsel. In the context of this motion, he concluded, a joint in-person hearing was appropriate.

The supervisory judges in B.C. (Bauman C.J.S.C., now C.J.B.C.) and Québec (Rolland C.J.) agreed, and made similar rulings.

The AGO and the Attorney General of B.C. (AGBC) appealed the decision of the supervisory judge in their respective provinces. The Attorney General of Québec did not.

Held: Appeal allowed in part, in a 3-way split decision.

Reasons for decision:

Two of the three judges (LaForme and Lauwers JJ.A.) agreed with Winkler C.J.O. that the inherent jurisdiction of the superior court enabled the Ontario supervisory judge to sit with his counterparts in a hearing outside Ontario. Ultimately, however, two of the three judges (Juriansz and Lauwers JJ.A.) held that the jurisdiction to hold an out-of-province hearing depends on the existence of a video-link to a courtroom in Ontario, as a hearing without such a link would violate the open court principle. The ONCA limited its decision to hearings involving a paper record, as opposed to those involving *viva voce* evidence.

LaForme J.A. agreed with Winkler C.J.O. that there was no constitutional, statutory, or common law prohibition on the superior court exercising its inherent jurisdiction to hold a joint hearing with superior court judges of other provinces in or outside Ontario. He found that a process involving parallel motions held in a single location, with the resulting orders issuing from each judge's home province, "respects the distinct nature of the courts of each province while stimulating the cooperation required to effectively administer the Settlement Agreement".

LaForme J.A. noted that Ontario has never legislated to prevent superior court judges from holding hearings outside the province. Thus the legislatures have not ousted or limited the superior court's inherent jurisdiction in this area, and in the absence of any such explicit legislative limit, the courts have the discretion to sit out-of-province as a function of their inherent jurisdiction where circumstances require. LaForme J.A. rejected the argument that the exercise of inherent jurisdiction is inappropriate if there is no historical precedent for its exercise in like circumstances. Freezing inherent jurisdiction in time would be "inconsistent with the very nature of the jurisdiction, which is to allow the court to control and regulate its process as the need arises." LaForme J.A. further held that it is wrong in law to equate the inherent jurisdiction and the narrow core jurisdiction of the s. 96 courts. Inherent jurisdiction provides the superior court with a residual source of powers upon which the court may draw in order to administer justice effectively. Core jurisdiction, by contrast, comprises "only those critically important jurisdictions which are essential to the existence of a superior court" and cannot be removed without amending the Constitution.

Finally, LaForme J.A. held that the open court principle does not require a video-link to a courtroom in Ontario for every out-of-province hearing. The open court principle does not dictate the geographic location of a hearing, and does not guarantee a right to be physically present in the courtroom. Whether or not to order a video-link should be a matter within the judge's discretion.

Juriansz J.A. disagreed with LaForme J.A., holding that a joint hearing taking place outside Ontario must be video-linked to an open courtroom in Ontario in order to satisfy the open court principle. According to Juriansz J.A., resort to inherent jurisdiction is unnecessary: a joint hearing taking place outside Ontario but video-linked to an open courtroom in Ontario would be permissible under Rule 1.08 of the *Ontario Rules of Civil Procedure*, which permit motions to be conducted by video-conference in certain circumstances.

Lauwers J.A. agreed with LaForme J.A. on every point except the video-link. Lauwers J.A. acknowledged that the power to hold an out-of-province hearing flows from the superior court's inherent jurisdiction, but held that s. 135 of the *Courts of Justice Act* (which states that courtrooms must be open to the public) constitutes a legislative limit on the exercise of that inherent jurisdiction, and imposes a video-link requirement to satisfy the open court principle.

B.C. Court of Appeal

Held: Appeal allowed.

Reasons for decision

The BCCA overturned Bauman C.J.S.C.'s decision. It held that the English common law historically prohibited judges in England from sitting outside England, and that this law, received into B.C. in 1848, prohibits Canadian provincial superior court judges from sitting outside their home provinces. The BCCA held that inherent jurisdiction did not allow the B.C. superior court to sit outside B.C. for three reasons. First, the powers inherited from the Royal Courts of Justice in England "did not give British Columbia judges the power to sit outside their territorial boundaries." Second, the BCCA read the Supreme Court of Canada's decision *in Ontario v. Criminal Lawyers' Association of Ontario* as equating and limiting the concept of the superior court's inherent jurisdiction to the constitutional concept of the "very narrow" core jurisdiction of a s. 96 court. Third, the BCCA held that the exercise of inherent jurisdiction is inappropriate if there is no precedent for its exercise in like circumstances.

The BCCA declined to "change" the common law by recognizing a discretion on the part of superior court judges to sit outside their home provinces. The court was concerned that out-of-province hearings might infringe the territorial principle, that they raise a wide range of policy and procedural issues, and that they endanger the open court principle.

The BCCA held that although the hearing must "take place" in B.C., the judge, some or all of the lawyers, and/or some or all of the witnesses may nevertheless be physically located

outside the province. So long as the extra-jurisdictional elements of the hearing are electronically linked to a B.C. courtroom, B.C. will be considered the site of the hearing – regardless of whether any of the participants are physically there. Absent that electronic link to a B.C. courtroom – even if it is vacant except for court staff – the judge would have no jurisdiction to conduct the hearing.

Significance for Practitioners

- Note that leave to appeal to the Supreme Court of Canada has been granted from both the ONCA decision and the BCCA decision.
- As the law in Ontario currently stands, a superior court judge can hold a hearing of a motion on a paper record in a location outside Ontario, but the proceedings must be linked by video to an open, staffed courtroom in Ontario in order to satisfy the open court principle.
- The coming Supreme Court decision may have significant implications for the management of national or multi-jurisdictional class actions, and may shed further light the concepts of inherent jurisdiction, core jurisdiction, and the open court principle.
- The fight is really about whether the courts have the ability to manage the issue of extra-provincial sittings on their own (though their inherent jurisdiction) or whether they can only do so with legislative blessing.

3. Inherent Jurisdiction - Power to Order an Assessment

Ziebenhaus v. Bahlieda**,** 2015 ONCA 471 (MacFarland, Rouleau and Lauwers JJ.A.), dismissing an appeal from the order of the Divisional Court (Sachs, Wilton-Siegel and Nolan JJ.), dated April 2, 2014, with reasons reported at 2014 ONSC 138, 119 O.R. (3d) 275, dismissing an appeal from the order of Edwards J. of the Superior Court of Justice, dated June 13, 2012, with reasons reported at 2012 ONSC 3787, requiring the plaintiff to undergo an examination by an assessor pursuant to the court's inherent jurisdiction.

Facts

The appellant Alexander Ziebenhaus was injured while skiing at a resort owned by the respondent. He allegedly suffered a brain injury and claimed loss of future income and loss of competitive advantage. His counsel arranged for a neuropsychological and psychovocational assessment. The assessment indicated that his vocational potential was limited. The respondent brought a motion asking the court to order that the appellant undergo another such assessment, this time by a vocational assessor whom the respondent had chosen. Section 105 of the *Courts of Justice Act* allows a court to order a party to undergo an examination by a "health practitioner" as defined in that Act. The parties agreed that a vocational assessor is not a "health practitioner" as defined in s. 105.

The motion judge allowed the motion, determining that the court had inherent jurisdiction to make an order for an assessment by someone who is not a "health practitioner". The Divisional Court affirmed the motion judge's order and agreed that the court has inherent jurisdiction to order assessments and examinations not specifically addressed by s. 105.

On appeal, the appellants argued that s. 105 "occupies the field" and that the court cannot have inherent jurisdiction to make such an order because this would conflict with the intent of the legislation.

Held: Appeal dismissed.

Reasons for decision

There is no basis to interfere with the Divisional Court's decision. That court considered the conflicting lower court jurisprudence. One line of cases interprets s. 105 as allowing the court to make an order for examination by an individual who is not a health practitioner only if a health practitioner needs the assessment as a diagnostic aid. The other line of cases indicates a court can exercise its inherent jurisdiction to order such an assessment to ensure justice between the parties is done.

The Divisional Court also fully canvassed the appellants' submission that s. 105 "occupies the field" and held that it does not. Health sciences have evolved to include a wide range of assessments by experts who are not "health practitioners". These assessments cannot all be characterized as diagnostic aids, and precluding their use in litigation would be contrary to good public policy.

On the issue of whether such an order would be contrary to the intent of s. 105, there is no error in the court's analysis or conclusion that it would not. Inherent jurisdiction can be removed only by clear and precise statutory language. This has not been done. The language of s. 105 of the *CJA* is permissive and non-exhaustive, and Rule 33 of the *Rules of Civil Procedure* only sets out how courts are to administer s. 105. Inherent jurisdiction to make such orders does not conflict with the relief under s. 105, nor should it be seen as extending that section's reach. Inherent jurisdiction is to be exercised only sparingly and in clear cases, when necessary to ensure justice and fairness.

The motion judge in this case properly invoked the court's inherent jurisdiction to make the examination order, having concluded that the order was necessary "in the interest of fairness".

Significance for practitioners

- This decision resolves a conflict in lower court jurisprudence and clearly establishes that the Superior Court of Justice has inherent jurisdiction to order a party to undergo an assessment by someone who is not a "health practitioner".

- The exercise of inherent jurisdiction is discretionary but should be exercised only sparingly and in clear cases, when the moving party demonstrates that it is necessary to ensure justice and fairness.
- This decision is significant to an understanding of the scope of inherent jurisdiction wielded by judges of the Superior Court.

4. Jurisdiction of the Court of Appeal to Reconstitute as Divisional Court

Pruner v. Ottawa Hunt and Golf Club, Ltd., 2015 ONCA 609 (Simmons, Epstein and Pardu JJ.A., sitting as Divisional Court), dismissing an appeal from the order of Justice Robert N. Beaudoin of the Superior Court of Justice, dated October 30, 2014, with reasons reported at 2014 ONSC 6272, dismissing an application involving a corporation governed by the *Corporations Act*.

The appellant was a long-time member of the Ottawa Hunt and Golf Club. The Club is a share capital social club and is a corporation governed under the *Corporations Act,* R.S.O. 1990, c. C.38. The Club has different membership classifications, including "permanent golfing" categories and social categories. The Club's corporate by-laws set out that members in one of the permanent golfing categories were entitled to receive one Class B voting share.

The appellant was a member in the "Fully Privileged Golfing" category and sought to transfer to a social category after health issues prevented him from regularly playing golf. The Club advised that the Board of Directors had instituted a policy that no longer permitted transfer from a golf category to a social category. In order to transfer, the appellant would be required to resign from the Club and request to rejoin as a Senior Social Member. Upon resignation, his Class B voting share would be cancelled.

The appellant brought an application in Superior Court seeking an order requiring the Board to accept his transfer application. He argued that the newly-adopted policy amounted to a variation or restriction of the rights attached to his Class B share and, therefore, the Board could not impose such a change unilaterally without applying to the Lieutenant Governor for the issue of supplementary letters patent following a shareholder vote, in accordance with s. 34(4) of the *Corporations Act*.

The application judge dismissed the application, finding that the Board was entitled to make policies respecting the management of the Club, so long as the policies were in the best interests of the corporation. He relied on the "business judgment rule" which accords deference to a business decision, so long as it lies within a range of reasonable alternatives.

Held: Appeal dismissed.

Reasons for decision

Preliminary Issue – Jurisdiction of the Court of Appeal to Hear the Appeal

Following the hearing, the court sought the parties' submissions on whether s. 329 of the *Corporations Act* applied to this case. That section provides that an appeal lies to the Divisional Court from any order made by a court under that Act. Counsel argued that the application judge's order was not made under the *Corporations Act* and instead was made pursuant to Rule 14 of the *Rules of Civil Procedure*. They argued that, to fall under s. 329, the order would have to be made pursuant to a power expressly conferred by the Act. Though the Act was relevant in interpreting the by-laws at issue, the origin of the power from which the judgment was derived was the *Rules*.

The panel disagreed with the parties' view. According to the panel, the application judge's order was "an order made by a court under [the *Corporations Act*]" as per s. 329 of that Act and therefore was appealable to the Divisional Court. The following factors support this conclusion:

- The fundamental premise of the appellant's argument was that the *Corporations Act* prevented the Board from unilaterally changing the rights associated with his Class B share. The Act was the lynchpin of his argument and was cited in his notice of application as one of the grounds for the application.

- The *Corporations Act*, like its successor, the *Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*"), does not have its own procedural code but rather is subject to the *Rules of Civil Procedure*. This court has adopted a generous interpretation of s. 255 of the *OBCA*, which is identical to s. 329 of the *Corporations Act*, stating that appeals of court orders made under that Act are appealable to the Divisional Court. Given the shared history of the two acts, the court should adopt the same generous approach to jurisdictional issues arising under the *Corporations Act*.

- Section 332 of the *Corporations Act* expressly provides for a remedy for an aggrieved shareholder such as the appellant, who is of the view that the corporation failed to perform a duty. The appellant's objection could legitimately be framed as imposing a positive duty on the Board to accept his application for transfer and refrain from imposing a condition that he surrender his voting share.

Thus, the application judge's order dismissing the appellant's application was an order made under the *Corporations Act* and the appeal should have been brought to the Divisional Court.

Since the jurisdictional issue was not detected until after the hearing at the Court of Appeal and the parties had already argued the merits of the appeal, this court sought a designation by the Chief Justice of the Superior Court to constitute the judges of the Court of Appeal in this matter as justices of the Divisional Court pursuant to s. 18(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This court is rarely reconstituted as Divisional Court – it is an option that is generally only resorted to where the jurisdictional issue is noticed after the appeal has been argued and is done to save the parties the expense and inconvenience of having to reargue the appeal.

Decision on the Merits

The Board's policy could not be fairly described as imposing a variation, condition or restriction on Class B shares. The by-laws made it clear that Class B shares were inextricably linked to membership in one of the permanent golfing categories. Furthermore, the policy does not force the appellant to give up his voting rights. He is entitled to keep his Class B share and continue to exercise voting rights associated with it, even if he never plays golf. Thus, the policy does not affect his rights as a shareholder and is indisputably a valid exercise of the Board's power, based on its by-laws.

Significance for Practitioners

- In deciding whether an appeal from a particular decision should be taken to the Court of Appeal, when the decision arises in the context of a statutory framework, it is critical for counsel to consider if the applicable statute provides for an appellate route that is different than that prescribed by the general provisions in ss. 6, 19 and 21.9.1 of the *Courts of Justice Act*. Provisions in other statutes may displace the general provisions of the *Courts of Justice Act* by providing that an appeal from an order under that Act lies to the Divisional Court (e.g., s. 255 of the *Ontario Business Corporations Act* and s. 30 of the *Class Proceedings Act*).

- As revealed in *Pruner*, the Court of Appeal has taken an expansive interpretation to the question whether an order is made under a statute having a specified appellate route: see *Amaranth L.L.C. v. Counsel Corp*. (2004), 71 O.R. (3d) 258 (C.A.); *Ontario Securities Commission v. McLaughlin*, 2009 ONCA 280, 248 O.A.C. 54; and *Pruner*.

- In *Pruner*, Justice Pardu acknowledged, at para. 51, that the Court of Appeal had heard appeals under the *Corporations Act*, including appeals from applications under s. 332, as of right without mentioning jurisdiction: see, e.g., *Rexdale Singh Sabha Religious Centre v. Chattha*, 2006 CanLII 39456; *Lawrence v. Toronto Humane Society*, 2006 CanLII 20224; and *Smith v. Toronto Police Assn*., 2008 ONCA 5, 234 O.A.C. 1. Nonetheless, if the court did not address the question of jurisdiction in deciding the appeal, then litigants will not be able to successfully rely on such decisions as precedents for conferring jurisdiction on the Court of Appeal in similar cases.
- As made clear in *Pruner*, the Court of Appeal will on rare occasion seek permission of the Chief Justice of the Superior Court of Justice to constitute the judges of the Court of Appeal as justices of the Divisional Court pursuant to s. 18(2) of the *Courts of Justice Act*. This option is generally only resorted to where the jurisdictional issue is identified after the appeal was argued. It should be noted, however, that if the jurisdictional problem that is overlooked is whether the order under appeal is final or interlocutory, then because there is no right to appeal an interlocutory order to the Divisional Court, the only remedy is to quash the appeal and the appellant will need to seek leave to appeal the order to the Divisional Court pursuant to s. 19(1)(b) of the

Courts of Justice Act: see *Waldman v. Thomson Reuters*, 2015 ONCA 53, 330 O.A.C. 142, at para. 17.

- Section 192 of the yet-to-be-proclaimed *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15, similarly provides that an appeal from any order made by the court under that act lies to the Divisional Court.

5. Appellate Review of a Decision Striking a Jury Notice

Kempf v. Nguyen, 2015 ONCA 114 (Laskin [dissenting], Rouleau and Epstein JJ.A.), allowing an appeal from the judgment of Justice Darla A. Wilson of the Superior Court of Justice dated April 5, 2013, with reasons reported at 2013 ONSC 1129 and 2013 ONSC 1977, striking a jury notice and finding liability on the part of the appellant (defendant).

Facts

During a charity bicycle ride on the Don Valley Parkway, the appellant suddenly swerved to the left, clipping the respondent Kempf's front wheel with his back wheel. The respondent fell and suffered serious injuries. The appellant did not stop. The appellant and respondent had been riding in different packs of cyclists, with the appellant's pack slightly ahead of the respondent's pack. The packs were tightly bunched and travelling at high speeds. Just prior to the crash, the respondent was attempting to catch up to the appellant's pack and moved into a position approximately two feet to the left of the appellant. The respondent did not warn the appellant of his intention. Prior to the ride, both the appellant and the respondent had signed a waiver that, among other things, purported to release the event organizers and related organizations from liability. Kempf and his family sued for negligence.

Prior to the opening of trial, the defendant amended his statement of defence to plead the defence that the plaintiff had voluntarily assumed the risk of the ride ("*volenti*"). The respondents successfully moved to strike out the jury notice that had been delivered by the appellant. The trial proceeded with the judge sitting alone. The appellant was found fully liable for the respondent's damages.

Held (Laskin J.A. dissenting): Appeal allowed, a new trial is ordered.

Reasons for decision - Epstein J.A. (for the majority)

The trial judge erred in striking out the jury notice. Although her reasons were not entirely clear, the trial judge's primary concern was that the jury would misinterpret the waiver and conclude that it released everyone involved in the ride, including other cyclists, of any liability. She found that even with a strong jury charge it would be "impossible" for the jury to use the evidence about the waiver only in the narrow way in which it was relevant to the question of liability. This was an error. The waiver was not complicated. The trial judge did not identify any ambiguity in it. It was clear that the waiver did not release other participants

from liability. Discharging a jury on the basis that it would be too difficult to explain the law is reversible error.

To the extent the trial judge's decision to strike out the jury notice was also based on the plea of *volenti* being a claim for declaratory relief, she erred in this regard as well. *Volenti* is not a claim for declaratory relief as referred to in s. 108(2) of the *Courts of Justice Act*: it is a full defence to a finding of negligence.

In any event, it would have been preferable for the trial judge to have reserved her decision on whether to discharge the jury until after the evidence had been completed or until a discrete problem arose. Nonetheless, the failure to "wait and see" was not, on its own, reversible error.

A new trial before judge and jury must be ordered to determine liability. This is not a case where any jury acting reasonably must inevitably have reached the same result as the trial judge did. The trial judge failed to address the issue of contributory negligence in her reasons even though there was evidence capable of supporting a finding of contributory negligence, including the respondent's testimony that he did not warn the appellant that he was approaching from behind. In addition, it would be open to a jury acting reasonably to assess credibility and the standard of care differently than did the trial judge.

Laskin J.A. (dissenting)

The trial judge did not err in exercising her discretion to discharge the jury. Although the right to a trial by jury in a civil case is an important right, it is far from absolute. The trial judge's discretion to retain or dismiss a jury is very broad. The trial judge did not characterize the defendant's plea of *volenti* as a claim for declaratory relief, and thus discharge the jury based on s. 108(2) of the *Courts of Justice Act*. Rather, she discharged the jury based on an exercise of her discretion.

Nor did the trial judge discharge the jury on the grounds of the complexity of the waiver alone. Rather, the trial judge was concerned that the jury would have been confused by the waiver and, because of its connection to the *volenti* defence, the jury may have used the waiver inappropriately in their deliberations despite a strong and correct charge.

Even if the trial judge did err in discharging the jury, a jury properly instructed and acting reasonably would inevitably have found the defendant liable for the plaintiff's injuries.

Significance for practitioners

- The decision indicates that counsel run a risk by bringing a motion to strike a jury notice on the grounds that the evidence may be confusing to, or be improperly used by a jury. The majority of the Court of Appeal was prepared to interfere with the trial judge's call on this issue when that call was motivated by an interest in ensuring the parties received a fair trial, because the majority was satisfied that the trial judge's decision reflected legal error (at para. 66).

- The majority's decision indicates that a "wait and see" approach to a motion to strike a jury on the basis of anticipated complexities is preferable to striking the notice at the outset.
- The Court of Appeal will order the remedy of a new trial for an improperly struck jury notice if the court is not satisfied any jury acting reasonably would inevitably have reached the same result as the trial judge did.

6. Surreptitious Video Evidence

Iannarella v. Corbett, 2015 ONCA 110 (Laskin, Lauwers and Hourigan JJ.A.), allowing an appeal from the judgment of Justice J. Patrick Moore of the Superior Court of Justice, sitting with a jury, dated April 11, 2012, with reasons reported at 2012 ONSC 2253, dismissing the plaintiff's negligence claim.

Facts

The plaintiff/appellant was rear-ended by the defendant/respondent's vehicle in stop-and-go traffic on a snowy evening. He claimed the accident caused a rotator cuff injury in his left shoulder, which led to chronic pain and an inability to work. At trial, the respondent played surveillance video of the appellant for the purpose of impeaching his credibility regarding his ability to move his left arm. The existence of the surveillance had not been disclosed to the appellant in an affidavit of documents prior to trial, despite repeated requests. However, the trial judge ruled that, since the surveillance footage was privileged and was not tendered as substantive evidence, there was no disclosure obligation under rule 30.09. The trial judge did not provide a limiting instruction to the jury regarding how the surveillance footage could be used. The trial judge also permitted the respondent to display medical reports from various practitioners on a screen within the jury's view during cross-examination of the appellant.

The trial judge concluded that the circumstances of the accident revealed that it was an emergency situation. As a result, he instructed the jury that the appellant bore the onus of proving that the respondent was driving negligently. The jury concluded that the respondent was not negligent and dismissed the appellant's claim. The trial judge also dismissed the appellant's motion for a declaration that he was catastrophically impaired for the purpose of s. 267.5 of the *Insurance Act*, R.S.O. 1990, c. I.8, and as a result, dismissed his claim for non-pecuniary damages.

Held: Appeal allowed.

Reasons for decision

The trial judge erred by failing to instruct the jury that, in rear-end collisions, a presumption arises that the following driver was negligent. The following driver bears the onus of establishing that the collision did not occur as a result of his or her negligence. Had the jury

been properly instructed, the evidence at trial could have only led to a finding of liability against the respondent. There was no suggestion that the appellant failed to meet the requisite standard of care, or that any other drivers on the road at that time were unable to stop their vehicles. The respondent's testimony did not reveal that he could not have avoided the accident by exercising the expected standard of skill and care. Given that only one outcome was possible on the evidence, it was appropriate to substitute the jury's conclusion with a finding of liability.

The trial judge also made a number of errors with respect to the surveillance evidence. Neither the claim of privilege nor the fact that the surveillance evidence was used solely for impeachment relieved the respondent of responsibility to disclose the existence of the surveillance in an affidavit of documents. The respondent's failure to do so deprived the appellant of the advantages of full disclosure and amounted to an attempt to conduct a trial by ambush. The trial judge should have excluded the surveillance under rules 30.08 and 53.08.

The trial judge also erred by permitting the surveillance footage to be played in court without first assessing its relevance on a *voir dire*. Further, the cross-examination of the appellant regarding the surveillance did not comply with the rule in *Browne v. Dunn*, since counsel for the respondent did not establish a sufficient factual foundation or particularize the testimony that it sought to impeach. Further, in his questioning of the videographers and in his closing jury address, counsel for the respondent moved beyond the scope of impeachment by suggesting the surveillance could be used as substantive evidence of the appellant's functionality. The trial judge's failure to enforce these evidentiary rules prejudiced the appellant. Finally, the trial judge erred by failing to instruct the jury that the surveillance could only be considered for the purpose of impeachment, and not as substantive evidence of the appellant's physical capacities.

Finally, the trial judge erred by permitting the respondent to project medical practitioner reports on the screen before the jury during cross-examination of the appellant. Not only did this have the potential to distract the jury's focus, it effectively disclosed the contents of these reports to the jury despite the fact that the reports had not been tendered as evidence. As a result, the respondent did not have to decide between tendering the reports and calling the practitioners as witnesses, as is typically required by s. 52 of the *Evidence Act*, R.S.O. 1990, c. E.23.

As a result of these errors, the court ordered a new trial on the issue of damages. A new trial would also be necessary on the issue of the catastrophic impairment threshold under s. 267.5 of the *Insurance Act*, should the appellant choose to pursue it.

<u>Significance for practitioners</u>

- The decision clarifies the scope of pre-trial disclosure obligations, and identifies the rationale of promoting judicial economy by discouraging practitioners from engaging in "trial by ambush". Failure to adhere to pre-trial disclosure obligations is contrary

to the *Rules of Civil Procedure*, and it can result in the exclusion of undisclosed evidence at trial.

- Serving an affidavit of documents is mandatory unless there is an express waiver of this right, and privileged documents must be included in the affidavit of documents.
- While video surveillance may be subject to litigation privilege, the surveillance evidence must be listed in the affidavit of documents. An updated affidavit of documents is required when new surveillance video is created. Parties are required to disclose the contents of the surveillance even though the films themselves remain privileged.

7. Enhanced Summary Judgment Powers

Trotter Estate, 2014 ONCA 841 (van Rensburg, Hourigan and Benotto JJ.A.), allowing the appeal from the judgment of Justice Margaret Eberhard of the Superior Court of Justice, dated February 22, 2013, dismissing the appellants' actions to set aside certain wills and land transfers.

Facts

The parties were family members embroiled in a bitter dispute over their mother's estate. The appellants are two children of the deceased, Audrie Trotter. The personal respondent, John, is another son of the deceased who was the primary beneficiary under Audrie's last will and who was the recipient of certain *inter vivos* transfers of land from Audrie, including a 100-acre farm property.

The appellants commenced related actions challenging the validity of their mother's wills and the *inter vivos* transfers of land on the grounds of undue influence. They also argued that the *inter vivos* transfers were procured by fraud. They alleged a pattern of isolation, control, fear and dependency by John over his mother. Unlike Audrie's previous wills which divided the majority of her personal property between the appellants and John, the last will left the entire residue to John. In addition, the appellants alleged that the invoices John had issued to his mother for repair work he performed on the farm property in the amount of almost $750,000 were fraudulent, since the magnitude of the invoices exceeded the estimated value of the entire property by a significant amount and could not be substantiated.

John, in both his personal capacity and in his capacity as co-executor of his mother's estate, brought a motion for summary judgment to dismiss the wills action. In addition, John sought to dismiss the transfer action in the event the wills action was dismissed on the basis that the transfer action would then be moot. The motion judge allowed the motion, dismissed both actions, and awarded costs to the respondents of $400,000.

The motion judge held that the appellants' allegations were "bald". She concluded that Audrie had not been unduly influenced because she was an independent woman who knew what she wanted, and was "nobody's fool". Finally, she held that Audrie had not been

defrauded by the invoices because she was present to see the work John performed on the farm property and signed off on the invoices. The motion judge concluded that the challenge to the *inter vivos* transfers was subsumed within the challenge to the will and therefore failed along with the wills action.

Held: Appeal allowed.

Reasons for decision

The judgment and costs order is set aside. The allegations of undue influence were not bald. There was evidence of John's anger, his temper, his efforts to keep Audrie isolated from the appellants, her fear of John, her dependence on him, his attempts to manipulate her, and her fear of being sent to a nursing home. There was evidence that Audrie transferred the farm property because she felt indebted to John for money he put into the property. The invoices were for an amount approximately $200,000 more than his estimated value of the property, and John could not substantiate the reasonableness or basis of the amount charged.

Because the allegations were not bald and were capable of supporting an inference of fraud or undue influence, it was incumbent upon the motion judge to explain why she rejected them. This requires a credibility analysis pursuant to the expanded judicial powers under rule 20.04(2.1) to weigh the evidence, evaluate the credibility of the appellants' deponents and draw reasonable inferences. The motion judge did not make proper use of the expanded powers of rule 20.04. She did not subject the appellants' evidence to evaluation or make credibility findings.

The motion judge's conclusory findings were legally insufficient to dispose of the allegations of undue influence and did not fully address the potential interplay between undue influence and fraud.

In assessing the invoices, the motion judge made palpable and overriding errors. She found that the invoices did not affect Audrie's decision to transfer the farm property to John, even though she recognized elsewhere in her reasons that Audrie explicitly told her lawyer that the transfer was motivated by the fact that John had put a lot of money into the farm property. Given the sheer magnitude of the invoices, they warranted increased scrutiny. John's evidence was insufficient to conclusively refute the appellants' allegations.

Despite the deferential standard of review that applies to summary judgment decisions, when a motion judge misdirects herself, errs in principle, or comes to a decision that is so clearly wrong that it results in an injustice, the decision cannot stand. In light of the motion judge's failure to properly assess the evidence, her erroneous finding that the appellants' allegations were "bald", her legally insufficient conclusions on undue influence and her misapprehensions of the evidence surrounding the invoices, the judgment cannot stand.

Significance for practitioners

- Post-*Hryniak*, the Court of Appeal will overturn orders granting summary judgment, including in cases that were decided under the more restrictive approach to summary judgment expressed in *Combined Air Mechanical v. Flesch*. Credibility assessments cannot be avoided where a case turns on issues of credibility. As Benotto J.A. stated at para. 49: "[T]he fact that the new process of adjudication [under rule 20.04(2.1) and (2.2)] is well-intentioned and can be beneficial cannot impose an imperative on the court to use it in every case. There is a risk that, in an effort to dispose of the case, the evidence will not be properly analysed. The Supreme Court affirmed in *Hryniak*, at para. 28, that "[t]he principal goal remains the same: a fair process that results in a just adjudication of disputes."
- Justice Benotto points out: "[i]t is not always a simple task to assess credibility on a written record. If it cannot be done, that should be a sign that oral evidence or a trial is required…. Where important issues turn on credibility, failure to make credibility findings amounts to reversible error" (at para. 55). Where there is extensive and conflicting evidence on factual matters, a motion judge is required to articulate the specific findings that support a conclusion that a trial is not required: see *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450.
- Relevant to the topic of professionalism, albeit on the part of the judge rather than counsel, Justice Benotto frowned on disparaging remarks that the motion judge directed at the appellants and their counsel, including a suggestion that they had advanced submissions with a "homophobic undertone". Justice Benotto commented: "It is not homophobic to inquire about the mere existence of a same-sex relationship. Moreover, the allegation first appeared in the motion judge's reasons, thereby affording counsel no opportunity to respond. It was a serious and admittedly baseless comment. It should not have been made" (para. 82). This comment indicates that, before making negative comments in reasons for judgment, a judge owes it to counsel to make any allegations of unprofessionalism or impropriety on the part of counsel during a hearing in order to afford counsel an opportunity to respond.

8. Dismissal for Delay: A Trilogy of Cases from the Court of Appeal for Ontario

MDM Plastics Ltd. v. Vincor International Inc., 2015 ONCA 28 (Feldman, Watt and van Rensburg JJ.A.), dismissing the appeal from the order of Lederer J. of the Divisional Court, dated February 1, 2013, with reasons reported at 2013 ONSC 710, allowing an appeal from the order of Master Benjamin T. Glustein, dated June 1, 2012, with reasons reported at 2012 ONSC 3101, refusing to set aside a default order dismissing an action for delay.

In 2009, MDM Plastics Limited ("MDM") commenced an action against Vincor International Inc. ("Vincor") alleging breach of contract. In July 2011, the registrar dismissed MDM's action for delay pursuant to rule 48.14 of the *Rules of Civil Procedure* ("the first dismissal order") after the plaintiff failed to respond to the registrar's status notice. Rule 48.14, as it then read,[1] required that an action be set down for trial within two years after the filing of the first statement of defence. Vincor consented to setting aside the first dismissal order, and its counsel suggested the parties discuss settlement. The first dismissal order was set aside in August 2011. The order setting aside the dismissal provided that a new status notice would be issued "forthwith".

A new status notice was issued in September 2011, but MDM did not receive it. MDM made a settlement offer and was awaiting Vincor's promised response when the action was dismissed for a second time, in December 2011 ("the second dismissal order"). After the second dismissal order came to counsel's attention, MDM immediately sought Vincor's consent to set it aside. Vincor refused to consent. MDM moved under rule 37.14 to have the second dismissal order set aside.

The master refused to set aside the second dismissal order. MDM appealed to the Divisional Court. Lederer J., sitting as a single judge of the Divisional Court, allowed the appeal.

Held: Appeal dismissed.

Reasons for decision

In considering the four factors identified in *Reid v. Dow Corning Corp*. (2001), 11 C.P.C. (5th) 80 (Ont. S.C.), at para. 41, the master erred in his assessment of whether there was prejudice to Vincor's ability to defend the action. He erred by concluding the majority of the Court of Appeal's decision in *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386, 102 O.R. (3d) 555, stands for the principle that the presumption of prejudice arising from the passage of time and the expiry of a limitation period can only be rebutted by affirmative evidence led

[1] Effective January 1, 2015, the version of rule 48.14 that applied in this trilogy of appeals was revoked. The relevant portion of the new rule 48.14 provides for dismissal by the registrar where an action has not been set down for trial or terminated following either five years after its commencement or January 1, 2017, whichever is later, unless the court orders otherwise

by the plaintiff. This is not the case. In evaluating the strength of a presumption of prejudice, all of the circumstances, including the defendant's conduct, must be considered.

Vincor's conduct indicated there was no actual prejudice to its ability to defend the action as a result of the delay. Vincor consented without conditions to setting aside the first dismissal order less than six months before the second dismissal order was made. This suggests there was no actual prejudice to its ability to defend the action at that point. Vincor's willingness to discuss settlement is similarly inconsistent with a presumption of prejudice.

The master also erred by failing to consider that the finality principle – central to *Wellwood* – did not apply here. Vincor did not gain any security of legal position following the second dismissal order because MDM immediately made it clear that it would seek to set aside the order.

Several factors support the Divisional Court's order setting aside the dismissal, including: MDM's counsel did not receive the second status notice; MDM moved promptly to set aside the second dismissal order after becoming aware of it; and the actions of Vincor's counsel do not indicate there was any actual prejudice to the defendant or reliance on finality.

H.B. Fuller Company v. Rogers (Rogers Law Office), 2015 ONCA 173 (Weiler, Epstein and Brown JJ.A.), allowing an appeal from the order of Myers J. of the Superior Court of Justice, dated September 9, 2014, refusing to set aside a default order dismissing an action for delay.

Facts

In October 2011, the appellants, H.B. Fuller Company and H.B. Fuller Construction Products Inc., commenced an action for damages in negligence and breach of contract against the respondent CPI, a supplier of patent management systems, and Rogers, a patent lawyer. The appellants sought damages arising from the abandonment of patents that they previously owned. The appellants were in settlement discussions with Rogers, and granted both defendants indulgences for filing statements of defence. In July 2013, Rogers died. Shortly thereafter, CPI filed its statement of defence.

In November 2013, the registrar issued a status notice, but the notice was mailed to the incorrect address. In February 2014, the registrar's order dismissing the action for delay was also sent to the wrong address. The appellants learned of the dismissal in March 2014. Instead of contacting CPI immediately and seeking its consent to set aside the registrar's order, counsel for the appellants took the position that the registrar had no jurisdiction to dismiss the action for delay because the status notice had not been served in accordance with the rules. Meanwhile, the appellants continued settlement discussions with Rogers' insurer. In June 2014, the appellants moved to set aside the registrar's order of dismissal after CPI refused to consent to reinstate the action.

The motion judge refused to set aside the registrar's order. He held that the appellants did not meet their burden of explaining the delay, which he said was attributable to their indulgences to CPI and desire to settle the action with Rogers. He also found they had not

met the burden of showing no prejudice to CPI given Rogers' death and the failure to conduct discoveries or otherwise preserve Rogers' evidence.

Held: Appeal allowed.

Reasons for decision

A judge hearing a motion to set aside a registrar's dismissal for delay must consider the following four well-known factors: the length of the litigation delay and whether the plaintiff has provided adequate explanation for it; whether the failure to meet the mandated time limits was due to inadvertence; whether the motion to set aside the dismissal order was brought promptly; and whether the delay has prejudiced the defendant. It is not necessary for a party moving to set aside the order dismissing its action for delay to satisfy each of the four factors. Instead the judge must adopt a contextual approach and take factors unique to the case into consideration.

The conjunctive two-part test from *Faris v. Eftimovski*, 2013 ONCA 360, that has been applied in deciding whether an action should be dismissed for delay following a status hearing under the former rule 48.14(3), requires the plaintiff to provide both an acceptable explanation for the delay and to show that the defendant would suffer no non-compensable prejudice if the action were allowed to proceed.

Neither the four-factor approach nor the two-part test provides an exhaustive list of all considerations. Regardless of which is followed, all the circumstances of the case must be considered in order to arrive at a just result. Furthermore, it is not only the plaintiff's conduct that must be considered, the defendant's conduct in the litigation is a relevant circumstance.

A judge is required to resolve the tension between two underlying policies: first, that civil actions should be decided on their merits; second, that civil actions should be resolved in a timely manner to maintain public confidence in the administration of justice. In reviewing a registrar's dismissal for delay under the former rule 48.14, the weight of this court's authority leans towards deciding actions on their merits, particularly where the delay results from an error committed by counsel. The court should consider the rights of all the litigants, including the plaintiff's right to have the action decided on its merits; whether the defendant has suffered non-compensable prejudice; whether a fair trial is still possible; and whether the principle of finality should prevail.

The motion judge in this case erred in his consideration of the explanation for delay. He did not give sufficient weight to the fact that the appellants did not receive the status notice, and the opportunities it lost because of this. He failed to consider that the appellants did not move to set aside the order sooner because of counsel's erroneous legal interpretation that the registrar lacked jurisdiction to dismiss the action. The motion judge also did not consider that the appellants moved relatively quickly to set aside the order – within three months of the dismissal.

The motion judge erred in his assessment of prejudice. He applied the holding in *Faris* without considering the factual differences between that case and the one before him. He did not consider that CPI was content to let the appellants focus on settlement negotiations with LawPro after Rogers' death since any settlement they might reach potentially reduced CPI's liability. Forcing CPI to file a statement of defence earlier and pushing ahead with discovery would not have been in keeping with the requirement of rule 1.04 of securing the least expensive determination of a civil proceeding on its merits. It is unfair in this case to ignore CPI's passivity. The motion judge also completely ignored the affidavit evidence of the appellants indicating there was no prejudice to the defendant.

Reweighing the relevant considerations regarding prejudice, a fair trial is still possible. The prejudice from Rogers' death was not increased by the appellants' failure to set the action down within the time limits mandated by the rules. Nothing occurred between the issuance of the status notice and the motion to set aside the dismissal order that increased the prejudice to CPI. The appellants have explained the delay and have rebutted the presumption of non-compensable prejudice.

Carioca's Import & Export Inc. v. Canadian Pacific Railway Ltd., 2015 ONCA 592 (Sharpe, Lauwers and van Rensburg JJ.A.), allowing an appeal from the order of Aston J. of the Superior Court of Justice, dated August 20, 2014, dismissing a motion to restore an action to the trial list.

Facts

In 2006, a fire started on railway lands occupied by the respondent, CP Railway, and spread to the appellant's nearby business, causing alleged damage. In 2007, the appellant commenced an action against the respondent for negligence. The respondent defended the action. Affidavits of documents were exchanged and examinations for discovery were conducted in 2008, which resulted in a number of undertakings by the appellant's representative.

In 2009, when the appellant tried to set the action down for trial, the respondent refused to execute a Certification Form to Set Pre-Trial and Trial Dates on the basis that the appellant still had outstanding undertakings from discovery. As a result of the form not being returned on time, the court office struck the action from the trial list.

In 2012, the action was restored to the trial list following an unopposed motion by the appellant. A pre-trial conference and trial were scheduled for 2013.

After further delay in providing documents in response to the appellant's undertakings, counsel agreed to adjourn pre-trial and trial dates to set a new deadline for providing the documentation and to facilitate the preparation of expert reports.

Counsel attended court to seek new dates on consent. The presiding judge instead struck the action from the trial list on the basis that the parties were not ready and disclosure was incomplete.

Production of documents continued and the appellant filed a rule 48.11 motion to restore the action to the trial list. The motion was not confirmed and the respondent refused to adjourn it on consent, requiring the appellant to serve and file a fresh motion. The motion was heard and dismissed. The action was then administratively dismissed with costs as a result of not being restored to the trial list in the amount of time required under the old rule 48.14.

The motion judge refused to restore the action to the trial list on the grounds that the appellant failed: (1) to provide a reasonable explanation for the delay, and (2) to establish that the respondent would suffer no non-compensable prejudice if the matter were restored to the trial list.

The plaintiff appealed on the ground that the trial judge incorrectly applied the relevant legal test.

Held: Appeal allowed.

Reasons for decision

The motion judge's decision was based on erroneous legal principles. A re-weighing of the evidence established that the plaintiff provided a reasonable explanation for the delay and there was no non-compensable prejudice that would result from the action being restored.

Where there is no impending dismissal, the question on a rule 48.11 motion is simply whether the plaintiff has shown that the action is "ready for trial" within the meaning of rule 48.01 – that is, whether it is at a stage where pre-trial and trial dates can be scheduled. If restoration to the trial list is premature, the court should consider the imposition of a timetable or terms.

Where, as here, the refusal to restore an action will result in its dismissal, the test from *Nissar v. Toronto Transit Commission*, 2013 ONCA 361, and case law respecting rule 48.14 dismissals will apply. The plaintiff must demonstrate the following:

1. there is an acceptable explanation for the delay in the litigation, and
2. if the action were allowed to proceed, the defendant would suffer no non-compensable prejudice.

In applying this test, a motion judge must strike a balance between the need for efficiency and the need for flexibility, such that cases can be tried on the merits where there is a reasonable explanation for non-compliance with the rules.

Errors by the Motion Judge

(i) Delay

In assessing whether a plaintiff's explanation for delay is reasonable, a judge should consider the following factors: overall conduct of the litigation in the context of local practices for scheduling pre-trial conferences and trials; overall progress of the action before it was listed for trial; how the action came to be struck from the trial list; and the conduct of all parties.

Applying too exacting a standard for restoring an action struck from the trial list may hinder the objective of an efficient justice system. Parties and counsel might argue over keeping matters on the trial list for fear that if the action is struck, it might never be restored. Fighting contested motions over cases being struck and restored to the trial list is not an effective use of scarce judicial and legal resources.

While a plaintiff is primarily responsible for moving an action forward, the conduct of the defendant is relevant in determining whether to restore an action to the trial list. The objectives of timely and efficient access to justice and effective use of court resources require all parties to play their part in moving actions forward.

The motion judge erred by focusing almost exclusively on the appellant's conduct and by not considering the overall dynamics of the litigation. When the motion was heard, the case was ready to proceed to trial. Keeping an action that is ready for trial off the list is punitive rather than efficient.

(ii) Prejudice

Prejudice is a factual question. The mere passage of time cannot be an insurmountable hurdle in determining prejudice. While the defendant is not required to offer evidence of actual prejudice, the court is entitled to consider the defendant's conduct in relation to the issue of prejudice.

The prejudice at issue is to the respondent's ability to defend the action as a result of the appellant's delay, not the sheer passage of time. The motion judge decided against the appellant on the prejudice issue based on an assumption that the passage of time would impair the memory of one missing witness, assuming he were found. The motion judge was required to consider the evidence in deciding the prejudice issue. In this case, oral discoveries were done relatively soon after the events in question and the documents authored by the missing witness were available. The defendant's conduct in consenting to the previous motion to restore the action to the trial list and its passivity in "to be spoken to" court when the court struck the action of its own motion suggest no non-compensable prejudice would result from restoring the action to the trial list.

Reweighing the Evidence

(i) Delay

In this case, the appellant provided a reasonable explanation for the delay. The following factors weighed in favour of restoring the action to the trial list: the appellant made steady efforts to obtain and produce documents; when the most recent motion to restore was brought, there were no outstanding undertakings; the respondent's conduct contributed to the delay (e.g., it made no effort to compel answers from the appellant before relying on unfulfilled undertakings in refusing to agree to pre-trial and trial dates); and the action was struck in a busy "to be spoken to" court on the court's own motion, not at the request of the respondent (in fact, the respondent consented to an adjournment before changing its position on the motion to restore).

It is not a condition of setting down an action or an action remaining on the trial list that all undertakings have been answered and all expert reports have been delivered: see rules 48.04(2)(a) and 53.03.

(ii) Prejudice

In this case, the only evidence of prejudice related to the unavailability of a witness who attended at the appellant's business the day after the fire. The respondent only contacted this witness on the eve of the motion to restore, undermining any claim that it would be prejudiced by his unavailability. Speculation that a case may depend in part on oral evidence, coupled with the assumption that a witness's memories generally fade with time will not, without more, prevent a plaintiff from satisfying the prejudice prong of the test.

The appellant adduced evidence that its witnesses and discovery transcripts were available. Given all the circumstances, the plaintiff demonstrated that there was no non-compensable prejudice that would result from the action being restored.

<u>Significance for practitioners of these decisions</u>

- Effective January 1, 2015, the version of rule 48.14 that applied in this trilogy of appeals was revoked. The relevant portion of the new rule 48.14 provides for dismissal by the registrar where an action has not been set down for trial or terminated following either five years after its commencement or January 1, 2017, whichever is later, unless the court orders otherwise. Nonetheless, the approach of the Court of Appeal to assessing the plaintiff's explanation for delay and evaluating prejudice can be expected to apply under the amended rule.
- Although the decision of a motion judge to set aside a dismissal order under rule 37.14 and a decision to restore an action to the trial list under rule 48.11 are discretionary ones, and therefore entitled to deference on appeal, in all three of these cases, the Court of Appeal unanimously overturned motion judge's orders that had the effect of terminating actions in the Superior Court of Justice.

- In *MDM v. Vincor*, Justice van Rensburg accepts that the power to dismiss an action for delay can be exercised in the absence of actual prejudice to a defendant. She ultimately concluded that even though the plaintiff's failure to prosecute the action in a timely way was "troubling", the absence of evidence of prejudice on the part of the defendants was an important factor favouring the order setting aside the dismissal order. The mere passage of time is not a basis for finding prejudice. In *Carioca's Import*, van Justice Rensburg adds that speculation that a case may depend in part on oral evidence, coupled with the assumption that witnesses' memories generally fade over time, will not prevent a plaintiff from satisfying the prejudice prong of the test (para. 76).
- Where a defendant is engaged in settlement negotiations or remains passive pending the results of settlement negotiations with a co-defendant, this conduct will tell against a finding that the defendant has been prejudiced by delay in prosecuting the action: see *MDM v. Vincor* and *Fuller v. Rogers*. Indeed, the court in *Fuller* indicates that it would not be in keeping with rule 1.04 for the plaintiff to require a defendant to file a statement of defence or to push ahead with discovery while it is engaged in serious negotiations with a co-defendant's insurer (at para. 41).
- In both *MDM v. Vincor* and *Fuller v. Rogers*, there was evidence indicating that the registrar's status notice was not sent to counsel's correct address. In *Fuller*, the Court of Appeal reaffirmed that the registrar has jurisdiction to dismiss an action for delay even if a status notice is not properly served on counsel: see *Finlay v. Van Paasen*, 2010 ONCA 204. Counsel's error of law in assuming that the registrar had no jurisdiction to dismiss an action for delay when the status notice was not properly served will not be an excuse for delaying in moving to set aside a dismissal order, but it should be a factor when assessing the explanation for delay in moving the action forward (*Fuller*, at paras. 12 and 32).

9. Rule 2.1 of the *Rules of Civil Procedure*

***Scaduto v. The Law Society of Upper Canad*a,** 2015 ONCA 733 (Blair, Hourigan and Brown JJ.A.), dismissing an appeal from the order of Justice Fred L. Myers of the Superior Court of Justice, dated May 5, 2015, dismissing an application as frivolous and vexatious pursuant to Rule 2.1 of the *Rules of Civil Procedure*.

The appellant was unsuccessful in a claim for work-related injuries that went all the way up to the Supreme Court of Canada. The Supreme Court denied his application for leave to appeal in 2013. In 2015, he commenced an application against the Attorney General of Ontario and the Law Society. He sought damages based on an alleged failure of the Law Society to fulfill its statutory duties in that it did not investigate the appellant's complaints about various lawyers, including the Registrar of the Supreme Court, who had refused the appellant's request for reconsideration of the Court's dismissal of his leave application. He

also sought an order compelling the Law Society to bar a convicted criminal from lecturing before the Ontario Bar.

The Attorney General requested that the motion judge dismiss the application as frivolous, vexatious or an abuse of process under rule 2.1.01(6) of the *Rules of Civil Procedure*. After reviewing the appellant's written submissions, the motion judge dismissed his application as being frivolous and vexatious on its face, finding that the application was largely an attempt to re-litigate the issues in his original failed claim.

The appellant argued that the motion judge erred in law by not reviewing the large volume of evidence filed in his amended application record before striking his application under Rule 2.1.

Held: Appeal dismissed.

Reasons for decision

The motion judge has decided a number of cases that have helped to delineate the procedure and test to be applied under Rule 2.1, which came into force on July 1, 2014. The Court of Appeal endorsed this line of authority, which holds that the rule should be interpreted and applied robustly so that a motion judge can effectively exercise his or her gatekeeping function to weed out litigation that is clearly frivolous, vexatious, or an abuse of process. However, the use of the rule should be limited to the clearest of cases where the abusive nature of the proceeding is apparent on the face of the pleadings. No evidence is received on the motion. There should generally be a basis in the pleadings to support the use of the attenuated process of Rule 2.1.

The motion judge did not err in not considering the evidence filed by the appellant in his supplementary application record. The focus under Rule 2.1 is on the pleadings and any submissions of the parties made pursuant to the rule. Resort to evidence defeats the purpose of the rule and leads to the danger that the Rule 2.1 process itself may be used by the party for an improper purpose.

The motion judge did not err in law or fact in concluding that the pleading was, on its face, frivolous and vexatious and incapable of success.

Significance for Practitioners

- The Court of Appeal's decision in *Scaduto* endorses the approach that Justice Myers has taken to applying the new Rule 2.1 to proceedings commenced in the Superior Court of Justice. The use of the rule should be limited to the clearest of cases where the abusive nature of the proceeding is apparent on the face of the pleadings.
- On occasion, counsel have formally requested the Registrar of the Court of Appeal for Ontario to send out a notice under Rule 2.1 in cases where it appears that the court does not have jurisdiction over the appeal. In such cases, counsel are better served by

bringing a motion to quash the appeal, which will proceed more efficiently than by invoking the Rule 2.1 process.

10. Civil Contempt of Court

Carey v. Laiken**,** 2015 SCC 17 (McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.), dismissing an appeal from the judgment of the Ontario Court of Appeal (Rosenberg, Sharpe and Gillese JJ.A.), 2013 ONCA 530, setting aside a decision of Roberts J., 2012 ONSC 7252, and restoring her initial contempt order.

Facts

Carey acted for a client in a lawsuit against Judith Laiken, who had retained the client to conduct off-shore security trades on her behalf. Laiken's funds were lost and litigation between the client and Laiken began.

Laiken obtained an *ex parte* Mareva injunction against Carey's client. The injunction prohibited the client and any person with knowledge of the order from disposing or otherwise dealing with any of the client's assets. It also directed any person with knowledge of it to take immediate steps to prevent the transfer of the assets, including those held in trust accounts in that person's power, possession or control. It was agreed between the parties that the injunction did not prohibit the payment of reasonable legal fees.

A few months after the Mareva injunction order was made, the client sent Carey a cheque for $500,000, with no instructions. Carey could not reach the client to obtain instructions. Carey deposited the cheque in his trust account, as required by Law Society of Upper Canada by-laws.

The client later called and told Carey to use the rest of the funds to settle the claims of a creditor other than Laiken. Carey responded that he could not do that because it would breach the terms of the Mareva injunction. The client then instructed Carey to settle with Laiken, but Carey was unable to negotiate a settlement.

Following the unsuccessful settlement negotiations, the client instructed Carey to return the trust funds to him, minus an amount to cover legal fees. Carey transferred $440,000 back to the client. Shortly after this, the client vanished.

Laiken eventually obtained summary judgment against the client for over $1 million. Advised that Carey had been holding money in trust for the client and had returned $440,000 to him, Laiken applied to have Carey found in contempt for having breached the Mareva injunction by returning the money to the client.

The Superior Court initially found Carey in contempt, but then set aside that finding in the course of the penalty hearing. The motions judge questioned whether the terms of the order were clear and whether Carey's interpretation of it was deliberately and willfully blind.

The Court of Appeal allowed the appeal and restored the contempt finding. First, the trial judge had erred in allowing Carey to use the second stage of the contempt hearing to attack the motions judge's decision on the first stage. Second, although Carey did not desire or knowingly choose to disobey the order, this was unnecessary to establish liability for civil contempt. Carey knew of a clear court order and committed an act that violated it; thus he was in contempt.

Held: Appeal dismissed.

Reasons for decision (Cromwell J., for a unanimous Court)

The question before the SCC was the required intent for a finding of civil contempt. The SCC held that contumacy – the intent to interfere with the administration of justice, in the sense of desiring or knowingly choosing to disobey the court order – is not an element of civil contempt. All that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in breach of a clear court order of which the alleged contemnor has knowledge. Contumacy or lack thereof goes to the penalty to be imposed following a finding of contempt, not to liability.

Cromwell J. stressed that contempt of court is crucial because the rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect.

Civil contempt has three elements, which must be established beyond a reasonable doubt: 1) the order alleged to have been breached must state clearly and unequivocally what should and should not be done; 2) the party alleged to have breached the order must have had actual knowledge of it (such knowledge may sometimes be inferred or established on the basis of the willful blindness doctrine); 3) the party alleged to have breached the order must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

The SCC rejected Carey's argument that contumacious intent should be a requirement when contempt is alleged against: a) individuals who cannot purge their contempt (either because the act that constituted the contempt cannot be undone or because a conflicting legal duty prevents compliance with the order); b) lawyers; and c) third parties.

Rather than recognizing a special rule for these circumstances, the SCC held that the courts retain discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case. For example, where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, a court may decline to find him/her in contempt. The SCC emphasized that contempt of court is an enforcement power of last rather than first resort and should not be used routinely to obtain compliance with court orders. The contempt power must be exercised cautiously and with great restraint.

Significance for practitioners

- Intent to interfere with the administration of justice is NOT required for a finding of civil contempt of court, and lack of such intent is not a defence.

- No special rule applies to lawyers, third parties, or those who cannot purge their contempt, though the courts retain a discretion to decline to impose a finding of contempt where doing so would be unjust in the circumstances of the case.

- Considerable caution is necessary with respect to any financial dealings (acceptance of fees, settlement instructions, etc.) with a client whose assets are subject to a Mareva injunction or any other judicially-imposed restriction.

11. Damages for Wrongful Breach of Crown Disclosure Obligations

Henry v. British Columbia (Attorney General), 2015 SCC 24 (McLachlin C.J. and LeBel,* Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ. [*LeBel J. took no part in the judgment]), allowing an appeal from a judgment of the British Columbia Court of Appeal (Hall, MacKenzie and Stromberg-Stein JJ.A.), 2014 BCCA 15, setting aside a decision of Goepel J., 2013 BCSC 665, allowing the plaintiff to amend his pleading to allege *Charter* damages on the basis of non-malicious conduct on the part of the Crown.

Facts

Mr. Henry was wrongfully convicted of a series of sexual assaults that occurred in Vancouver in the early 1980s. He was declared a dangerous offender and sentenced to an indefinite period of incarceration. In 2010, the British Columbia Court of Appeal ("BCCA") quashed all 10 convictions. The BCCA found that there had been serious errors in the conduct of the trial, as the Crown had failed to meet its disclosure obligations under the *Charter*. Mr. Henry had requested disclosure of all victim statements as well as medical and forensic reports. The Crown eventually provided him with 11 victim statements, but did not disclose 30 additional statements, some of which revealed inconsistencies that undermined the Crown's identification evidence. The Crown also failed to disclose key forensic evidence, in the form of sperm found at some of the crime scenes that could have been used to include or exclude a suspect based on blood type. The BCCA therefore concluded that the guilty verdicts were unreasonable, and acquitted Mr. Henry on each count. By the time he was acquitted, Mr. Henry had been wrongfully imprisoned for nearly 27 years.

Mr. Henry sued the AGBC for the damages he suffered as a result of the Crown's failure to disclose relevant information.

In a pre-trial motion, the question arose whether Mr. Henry could claim *Charter* damages against the AGBG for non-malicious Crown conduct.

The BC Supreme Court (Goepel J.) held that a threshold lower than malice should apply: *Charter* damages should be available when the Crown's conduct represents a marked and

unacceptable departure from the reasonable standards expected of prosecutors (essentially a "gross negligence" standard).

The BCCA reversed this decision on appeal, holding that *Charter* damages are not available for non-malicious acts and omissions by the Crown.

Held: Appeal allowed.

Reasons for decision

Majority (Moldaver J., Abella, Wagner, Gascon JJ. concurring)

Proof of malice is not required for *Charter* damages based on wrongful non-disclosure. A cause of action will lie where the Crown causes harm to the accused by intentionally withholding information when it knows, or would reasonable be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence.

Malice is too high a threshold to apply in the context of *Charter* damages for wrongful non-disclosure. Moldaver J. distinguished between a claim for malicious prosecution and one for *Charter* damages based on wrongful non-disclosure. The wrongdoing targeted by the tort of malicious prosecution is the decision to initiate or continue an improper prosecution, which is a highly discretionary decision. The "improper purpose" inquiry is apt when the impugned conduct is a discretionary decision, because discretionary decision-making can best be evaluated by reference to the decision-maker's motives. Disclosure, by contrast, is not a discretionary decision: it is a constitutional obligation which must be properly discharged by the Crown in accordance with the accused's right to make full answer and defence. Thus a threshold lower than malice is justified when a court is asked to determine whether the Crown is liable for wrongful non-disclosure.

However, the majority was concerned about opening up the floodgates of civil liability against Crown prosecutors. In the majority's view, setting the liability threshold too low would have a widespread chilling effect on the behaviour of Crown counsel, and would divert Crown counsel from their important public duties by exposing them to a litany of civil claims. He therefore rejected Mr. Henry's argument (adopted by the concurring judges) that the threshold should be a simple breach of the *Charter* without any additional element of fault. He also held that the "gross negligence" threshold proposed by the trial judge was too low.

Instead, Moldaver J. concluded that in order to establish a claim for *Charter* damages for failure to meet Crown disclosure requirements, a claimant must prove on a balance of probabilities that: (1) the prosecutor intentionally withheld information (meaning that the prosecutor was actually in possession of the information and failed to disclose it); (2) the prosecutor knew or ought reasonably to have known that the information was material to the defence and that the failure to disclose would likely impinge on his or her ability to make full answer and defence; (3) withholding the information violated his or her *Charter* rights; and (4) he or she suffered harm as a result.

In order to establish causation, the claimant must prove on a balance of probabilities that "but for" the wrongful non-disclosure, s/he would not have suffered the harm. In the case of multiple wrongdoers (e.g. the police and the Crown), the causation requirement will be satisfied if the claimant can prove that the prosecutorial misconduct materially contributed to the harm suffered.

Concurring Reasons (McLachlin C.J. and Karakatsanis JJ.)

The concurring judges did not share the majority's concern that setting a low threshold for *Charter* damages for non-disclosure would "open up the floodgates" of civil liability against the Crown. Stressing that the duty to disclose is not a discretionary function but a legal obligation, they held that a claimant should not have to prove that the Crown breached its constitutional obligation of disclosure intentionally, or with malice, in order to access *Charter* damages. It is sufficient for the claimant prove that the disclosure obligation was breached and that *Charter* damages would be an appropriate and just remedy, serving one or more of the functions of compensation, vindication and deterrence.

<u>Significance for practitioners</u>

- This decision represents a narrow expansion of Crown liability beyond the tort of malicious prosecution, allowing *Charter* claims from wrongful breach of Crown disclosure obligations.

- The majority set the threshold for such claims deliberately high, allowing recovery only when the Crown intentionally withholds information that would reasonably be expected to impact the accused's right to full answer and defence.

- The threshold for "intentional conduct", however, appears to be set fairly low: to demonstrate that the Crown intentionally withheld information, a claimant need only prove that prosecutors were actually in possession of the information and failed to disclose it, or that prosecutors were put on notice of the existence of the information and failed to obtain possession of it. In these circumstances, the intention to withhold may be inferred, though it is open to the Crown to lead rebuttal evidence to show that withholding was not intentional.

12. Reasonable Apprehension of Judicial Bias

Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General), 2015 SCC 25 (McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ.), dismissing an appeal from the judgment of the Yukon Court of Appeal (Groberman, Bennett and MacKenzie JJ.A.), 2014 YKCA 4, setting aside a decision of Ouellette J., 2011 YKSC 57, and ordering a new trial.

Facts

The Yukon Francophone School Board sued the Yukon government for alleged deficiencies in the provision of minority language education. The judge presiding over the trial had been involved in the franco-albertan community and was currently serving as a governor of a not-for-profit organization dedicated to enhancing the vitality of the francophone community in Alberta.

Over the course of the trial, the judge made a number of comments and decisions that led counsel for the Yukon to bring a recusal motion for reasonable apprehension of bias. For instance, the trial judge ruled that the Yukon's conduct in sharing information from student files was in breach of its confidentiality obligations, and referred to this as "objectionable and reprehensible", without properly entertaining submissions on the issue. The judge accused counsel for the Yukon of "playing games" in response to a request to entertain further submissions. He asked questions with the objective of taunting counsel rather than obtaining information, and generally treated counsel with a lack of respect on many occasions. In another incident, the judge accused counsel for the Yukon of engaging in delay tactics for seeking to adduce the evidence of a witness who was recovering from a stroke by affidavit, and threatened counsel with a personal order for costs on this basis. The trial judge also refused to allow the Yukon to make reply submissions on the costs of the trial despite the fact that the Board's cost submissions had included unexpected claims for not only solicitor-client costs, but punitive and retroactive costs.

The Yukon brought a recusal motion for reasonable apprehension of bias on two bases: 1) the judge's conduct during the trial and 2) the judge's involvement in the franco-albertan community, both before and during his time as a judge.

The trial judge dismissed the recusal motion on both grounds.

The Yukon Court of Appeal ("YCA") reversed on both grounds. First, the trial judge's conduct met the threshold for finding a reasonable apprehension of bias. Second, the trial judge's current role as governor of the Fondation franco-albertaine made it inappropriate for him to sit on cases like the one under appeal. In the YCA's view, the Fondation promoted a vision of the francophone community that would clearly align it with some of the positions taken by the Board in the case.

On the merits, the YCA held that the trial judge had erred in interpreting s. 23 of the *Canadian Charter of Rights and Freedoms* to give the Board the unilateral right to set admission criteria so as to include students not expressly covered by s. 23. The Court of Appeal also held that the trial judge had erred in ordering that all of the Yukon's communications with the Board had to be in French.

Held: Appeal dismissed.

Reasons for decision (Abella J. writing for a unanimous court)

The SCC took this opportunity to re-iterate the accepted principles regarding reasonable apprehension of bias, but also to emphasize that a judge's identity and life experiences do not inherently compromise judicial impartiality.

The test for reasonable apprehension of bias is whether a reasonable, informed person would think it more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly. The objective of the test is to ensure not only the reality, but the appearance of a fair adjudicative process. There is a strong presumption of judicial impartiality – i.e. absence of actual or perceived bias. Thus the test requires "real likelihood or probability of bias". The inquiry is inherently contextual and fact-specific, and the burden on the party alleging bias is a high one.

The SCC stressed that judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions, or sensibilities. Judges are not required to abandon who they are or what they know. Impartiality demands not that a judge discount or disregard his or her life experiences or identity, but that he or she approach each case with an open mind, free from inappropriate and undue assumptions. The judge must ensure that his or her identity and experiences do not close his/her mind to the evidence and issues in the case.

The SCC agreed with the Court of Appeal that the trial judge's conduct in this case was troubling, problematic, and gave rise to a reasonable apprehension of bias.

The SCC disagreed, however, that the judge's service as a governor of the Fondation franco-albertaine substantially contributed to a reasonable apprehension of bias.

The SCC acknowledged the importance of judges avoiding affiliations with certain organizations, such as advocacy or political groups, but asserted that judges should not be required to immunize themselves from participation in community service where there is little likelihood of potential conflict of interest.

Membership in an association affiliated with the interests of a particular race, nationality, religion or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. Abella J. noted that Canada has devoted a great deal of effort to creating a more diverse bench; that very diversity should not operate as a presumption that a judge's identity closes the judicial mind.

In this case, the judge was the governor of an organization whose mission is to establish charitable activities to enhance the vitality of Alberta's francophone community, and whose vision is for a francophone community in Alberta that is autonomous, dynamic and valued. While consideration of the judge's role in that organization was a valid part of the contextual bias inquiry, there was no evidence that involvement with this organization would in itself compromise the judge's ability to hear this case.

Merits of the case

On the merits, the SCC held that although the Yukon could have delegated the function of setting admission criteria for children of non-rights holders to the Board, it had not done so in this case. Thus there was no authority for the Board to unilaterally set admission criteria. It remained open to the Board to argue that the admission criteria set by the Yukon fail to meet the goal of s. 23 of the *Charter*. The SCC sent the issue of whether the Yukon had to communicate with the Board and its employees in French back to trial along with other issues remitted by the YCA, for determination on a full evidentiary record.

<u>Significance for practitioners</u>

- Recusal motions for reasonable apprehension of bias on the basis of a judge's involvement in an organization affiliated with the interests of a particular race, nationality, religion, language, etc. will fail. Judges are not expected to be robots. Motions grounded in a judge's actual conduct are more likely to succeed. Judges are expected to remain impartial despite their own personal affiliations.
- The burden on a party alleging reasonable apprehension of bias is a high one, and requires evidence pointing to a real likelihood/probability of bias.
- The power to set admissions criteria to francophone schools lies with the provincial/territorial government, but can be delegated.