Court File No. CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Applicants

REPLY BOOK OF AUTHORITIES OF THE RETIREES

(Returnable July 24, 2013)

July 19, 2013

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TO: ATTACHED SERVICE LIST

Court File No. CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED
INDALEX HOLDINGS (B.C.) LTD.
6326765 CANADA INC. and
NOVAR INC.**

**SERVICE LIST
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Indexed as:

Imperial Oil Ltd. v. Commonwealth Construction Co.

Commonwealth Construction Company Limited (Defendant), Appellant; and Imperial Oil Limited and Wellman-Lord (Alberta) Ltd. (Plaintiffs), Respondents.

[1978] 1 S.C.R. 317

Supreme Court of Canada

1976: May 25 / 1976: October 19.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Insurance -- Property insurance -- Multi-peril subscription policy -- Named insured including owner, contractor and subcontractor -- Subcontractor responsible for fire causing damage to its property and to rest of building project -- Subcontractor's insurable interest extending to entire project prior to loss -- Insurers having no right of subrogation.

A general contractor, Wellman-Lord, entered into a contract with Imperial Oil Ltd. for the construction of a fertilizer plant, and a subcontractor, Commonwealth, was charged with the installation of process piping. In the course of that installation a fire took place, which was admittedly the responsibility of Commonwealth. The damage to the property of the latter was $305.05 and to the rest of the project $102,628.50. The total damage was covered under a multi-peril subscriptions policy stated to be property insurance. The named insured included "Imperial Oil Limited and its subsidiary companies and any subsidiaries thereof and any of their contractors and subcontractors".

The damage in its entirety was claimed by, and paid to, Imperial which had Wellman-Lord effect the repairs. An action against Commonwealth claimed the cost thereof, less the damage of $305.05 to the property of Commonwealth. Notwithstanding the fact that plaintiffs were apparently Imperial and Wellman-Lord, the action had in reality been brought by the insurers alleging subrogated rights obtained from the owner, Imperial, as well as the general contractor, Wellman-Lord. Commonwealth denied the possibility for the insurers to invoke any such rights and asserted in substance that in the event the insurers had obtained no subrogation. The trial judge agreed with Commonwealth's

submission but was reversed by the Alberta Appellate Division. Commonwealth appealed to this Court.

Held: The appeal should be allowed and the trial judgment restored.

In the case of true joint insurance the interests of the joint insured are so inseparably connected that several insureds are to be considered as one with the obvious result that subrogation is impossible. In the case of several insurance, if the different interests are pervasive and if each relates to the entire property, albeit from different angles, again there is no question that the several insureds must be regarded as one and that subrogation is possible. In the context of the construction contracts in this case, the various trades had, prior to the loss, such a relationship with the entire works that their potential liability therefor constituted an insurable interest in the whole.

By recognizing in all tradesmen an insurable interest based on the very real possibility of damage by one tradesman to the property of another and to the construction as a whole, which itself has its source in the contractual arrangements opening the doors of the job site to the tradesmen, the courts would apply to the construction field the principle long ago expressed in the area of bailment. In that field full insurable interest has long been held to exist in others than the owner because of their special relationship with the property entailing possibility of liability.

Accordingly, Commonwealth was an insured whose insurable interest extended to the entire works prior the loss so that, in accordance with the basic principle, the insurers had no right of subrogation.

Also, the principle that even if insurers have a subrogation right in a given case, they may renounce that right, was applicable here. Under the policy it was to the rights of the insured, i.e., the entire group including Imperial, Wellman-Lord and Commonwealth, that the insurers were subrogated, not to the rights of some members of this group against another member of the same group.

Cases Cited

Waters v. Monarch Fire and Life Assurance Co., [1843-60] All E.R. Rep. 654; London and North Western Railway Co. v. Glyn (1859), 1 El. & El. 652; Smith v. Stevenson, [1942] O.R. 79, applied; Simpson and Co. v. Thompson, Burrell et al. (1877), 3 App. Cas. 279; Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd., [1976] 2 S.C.R. 221; Morris v. Ford Motor Co., [1973] 2 All E.R. 1084, referred to.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division [[1975] 2 W.W.R. 72, 46 D.L.R. (3d) 399], allowing an appeal from a judgment of O'Byrne J. Appeal allowed.

J.R. Smith, Q.C., for the defendant, appellant. R.L. Fenerty, Q.C., for the plaintiffs, respondents.

Solicitors for the defendant, appellant: MacKimmie, Matthews, Calgary.
Solicitors for the plaintiffs, respondents: Fenerty, Robertson & Co., Calgary.

The judgment of the Court was delivered by

DE GRANDPRÉ J.:-- In March 1967, Imperial Oil Limited ("Imperial") decided to proceed with the construction of a fertilizer plant at Redwater, near Edmonton. It entrusted the work, of a value in excess of $20 millions, to Wellman-Lord (Alberta) Ltd. ("Wellman-Lord"). Subletting was, of course, part of the agreement and appellant ("Commonwealth") was the subcontractor charged with the installation of process piping.

In October 1968, in the course of that installation, a fire took place which, for the purpose of this appeal, is admittedly the responsibility of Commonwealth. The damage to the property of the latter was $305.05 and to the rest of the project $102,628.50. The total damage was covered under a multi-peril subscription policy stated to be property insurance, which it clearly is. On the first page thereof, in the first few lines, is to be found the following:

Name of THE INSURED	IMPERIAL OIL LIMITED AND ITS SUBSIDIARY COMPANIES AND ANY SUBSIDIARIES THEREOF AND ANY OF THEIR CONTRACTORS AND SUBCONTRACTORS
Loss payable to	Insured or Order.

The words "Name of the Insured" and "Loss payable to" are printed whereas the balance of the text is typewritten. As a matter of fact, apart from the statutory conditions and the standard insuring agreement and exclusions, the policy is entirely typewritten. In the construction contract between Imperial and Wellman-Lord, it is described as a course of construction policy; it is also known in insurance parlance as a builders' (also spelled "builder's") risk policy.

The damage in its entirety was claimed by, and paid to, Imperial which had Wellman-Lord effect the repairs. The action claims the cost thereof, less the damage of $305.05 to the property of Commonwealth. Notwithstanding the fact that plaintiffs are apparently Imperial and Wellman-Lord, the official respondents before this Court, the action has in reality been brought by the insurer alleging subrogated rights obtained from the owner, Imperial, as well as the general contractor, Wellman-Lord. Commonwealth denies the possibility for the insurers to invoke any such rights and asserts in substance that in the event the insurer have obtained no subrogation. The trial judge agreed with Commonwealth's submission in a very short judgment but was reversed by the Appellate Division. This last judgment being now reported a 46 D.L.R. (3d) 399, I will refrain from quoting therefrom.

There are two issues in this appeal, which I will venture to express in my own terms:

1) did Commonwealth, in addition to its obvious interest in its own work, have an insurable interest in the entire project so that in principle the insurers were not entitled to subrogation against that firm for the reason that it was assured with a pervasive interest in the whole of the works?
2) if Commonwealth was not such an insured, were the insurers entitled to take advantage of their basic right to subrogation considering

a) the wording of the subrogation clause and of the policy as a whole;
b) the contractual arrangements between Imperial, Wellman-Lord and Commonwealth?

The Court of Appeal dealt at length with only the first issue.

I

On that first issue, given the fact that the policy is property insurance and not liability coverage, the reasoning of the Court of Appeal may be summarized thus:

1) a policy issued to many persons will constitute joint insurance if there is in existence a true joint interest, e.g. joint ownership; in that case, no subrogation is possible;
2) a policy issued to many persons will amount to several insurance if the persons insured have different interests in the subject-matter of the insurance; that is the situation in the case at bar and the possibility of subrogation must be examined in the light of the covenant for indemnification given by the insurers to Commonwealth;
3) this covenant limits Commonwealth's rights of indemnification to the property furnished by it to the project and to any other property for which Commonwealth was responsible before the loss occurred; the circumstances of the case showing that Commonwealth had no liability for that other property prior to the loss, the insurers had the right to obtain subrogation.

For the purpose of this appeal, Commonwealth does not quarrel with the first two of these propositions. It asserts, however, that the Court of Appeal erred in holding that the policy indemnified Commonwealth only to the extent of the portion of the work performed by it under the subcontract.

The starting point of that submission is the basic principle that subrogation cannot be obtained against the insured himself. The classic example is, of course, to be found in Simpson and Co. et al. v. Thompson, Burrell et al. [(1877), 3 App. Cas. 279.] In the case of true joint insurance, there is, of course, no problem; the interests of the joint insured are so inseparably connected that the several insureds are to be considered as one with the obvious result that subrogation is impossible. In the case of several insurance, if the different interests are pervasive and if each relates to the entire property, albeit from different angles, again there is no question that the several insureds must be regarded as one and that no subrogation is possible. In Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd. [[1976] 2 S.C.R. 221.], Pigeon J. wrote at p. 251:

> When a building in construction is insured for the joint benefit of the owner and contractor, certainly the latter is not expected to be held liable for loss caused by the negligence of his workmen.

Although this statement may be said to be an obiter, because made in a landlord-tenant case, it does, in my view, express correctly the principle. In Ross Southward Tire Ltd. et al. v. Pyrotech Products Ltd. et al. [[1976] 2 S.C.R. 35.], another landlord-tenant case, the point was not mentioned but the conclusion reached by the majority necessarily implies acceptance.

Is the interest of appellant in the entire project pervasive? Commonwealth submits that it is one member of a group called "the insured" and that all the members of that group are on the same footing when it comes to receiving the benefit of the insurance should the property insured be lost or damaged by the happening of an insured risk.

That property is described in clause 1 of the policy:

> This Policy covers all materials, machinery, equipment including labour charges, and all other property of any nature whatsoever owned by Insured or in which the Insured may have an interest or responsibility or for which the Insured may be liable or assume liability prior to loss or damage to be used or incidental to the fabrication, installation, completion, upkeep, expansion, modification, and all other changes or extensions (whether defined herein or not), all pertaining to the Fertilizer Plant situated at Redwater, Alberta.

The question is: in the context of the construction contracts, did the various trades have, prior to the loss, such a relationship with the entire works that their potential liability therefor constituted an insurable interest in the whole?

In certain fields of mercantile law, e.g. bailment in the widest sense, full insurable interest has for a long time been held to exist in others than the owner because of their special relationship with the property entailing possibility of liability.

It is sufficient to refer to the now classic decisions of Waters v. Monarch Fire and Life Assurance Co. [[1843-60] All E.R. Rep. 654.] and London and North Western Railway Co. v. Glyn [(1859), 1 El. & El. 652.], applied by the House of Lords as recently as 1966 in Hepburn v. A. Tomlinson (Hauliers), Ltd. [[1966] All E.R. 418.] These two classic decisions were also referred to with approval by the Supreme Court of the United States in Phoenix Insurance Co. v. Erie and Western Transportation Co. [(1866), 117 U.S. 312.]., which was followed in Wager v. Providence Insurance Co. [(1893), 150 U.S. 99.]. The decisions of the Canadian Courts applying this doctrine are numerous and I will only refer to Smith v. Stevenson [[1942] 1 D.L.R. 681, [1942] O.R. 79.], a judgment of the Ontario Court of Appeal. Although these judgments were pronounced on policies issued to the bailee and not to the owner and all other interested parties, as in the case at bar, I do not see that circumstance making any difference when it comes to determining the existence or non-existence of an insurable interest in a person who is not the owner of the property.

In all these cases, there existed an underlying contract whereby the owner of the goods had given possession thereof to the party claiming full insurable interest in them based on a special relationship therewith. Although in the case at bar Commonwealth was not given the possession of the works as a whole, does the concept apply here? I believe so. On any construction site, and especially when the building being erected is a complex chemical plant, there is ever present the possibility of damage by one tradesman to the property of another and to the construction as a whole. Should this possibility become reality, the question of negligence in the absence of complete property coverage would have to be debated in court. By a recognizing in all tradesmen an insurable interest based on that very real possibility, which itself has its source in the contractual arrangements opening the doors of the job site to the tradesmen, the courts would apply to the construction field the principle expressed so long ago in the area of bailment. Thus all the parties whose joint efforts have one common goal, e.g., the completion of the construction, would be spared the necessity of

fighting between themselves should an accident occur involving the possible responsibility of one of them.

This reading of the policy finds support in general condition 5 entitled "Trustee Clause":

> (a) It is hereby declared and agreed that the insurance provided by this Policy is obtained by the Owner on his own behalf and as trustee for the benefit of any and all Contractors who heretofore or hereafter enter into a contract with the Owner, or other insured contractor relating to the construction of the project described in Clause 1 of the wording.
> (b) In consideration of the premium charged, the Insurers hereby waive any right they have or may have to contest the inclusion as an insured under this Policy of any person, firm or corporation qualifying as an insured by virtue of clause 5.(a) above,...

All contractors are put on the same footing which is also the statement made in general condition entitled "Definitions":

> Contractor as referred to in this Policy shall mean any and all persons, firms or corporations who perform work under contract with the Owner or the project described in Clause 1 of the wording, including all sub-contractors but shall not in any event include a supplier of machinery, equipment or materials who does not perform work at the job site.

While these conditions may have been inserted to avoid the pitfalls that were the lot of the unnamed insured in Vandepitte v. Preferred Accident Insurance Corpn. of New York [[1933] A.C. 70.], a precaution that in my view was not needed, they without doubt cover additional ground.

I have already said that the policy is basically a typewritten one, which was issued after the signature of the main construction contract, according to which the general contractor never owns any part of the works but assumes full liability therefor. In the description of the property insured, the words "assume liability prior to loss" are sufficient to define the interest of the general contractor.r The words "may be liable" add another dimension and are wide enough, in my eyes, to recognize in all contractors (which term, I underline again, includes subcontractors) an insurable interest having its source in the very real possibility ("may") of liability, considering the close inter-relationship of the labour performed by the various trades under their respective agreements. Of course, that very real possibility exists prior to the loss.

In reaching that conclusion, I do not have to rely on clause 7 of the subcontract whereby:

> It is further agreed that Sub-Contractor binds himself to Contractor to comply fully with and to assume all undertakings, obligations and duties of Contractor as set forth in Plans, Specifications and General Conditions, insofar as applicable to the Work included in this Sub-Contract.
>
> Sub-Contractor agrees to pay and indemnify Contractor from and against all losses, liabilities, suits or obligations of every kind paid or incurred by Contractor on account of failure of Sub-Contractor to perform agreements herein.

Whether or not these stipulations could be said to impose on the subcontractor a contractual liability for the entire works is a question that may well remain unanswered.

I do not know of any major Canadian decisions on the point which makes it of more than usual interest to see what is being done elsewhere. It appears to be the situation in the United States that an action such as the one put forth by the insurers here could not succeed. In General Insurance Company of America v. Stoddard Wendle Ford Motors [(1966), 410 P.2d 904.], the Supreme Court of Washington, through the voice of Hill J., stated at p. 908:

> The courts have consistently held, in the builder's risk cases, that the insurance company--having paid a loss to one insured--cannot, as subrogee, recover from another of the parties for whose benefit the insurance was written even though his negligence may have occasioned the loss, there being no design or fraud on his part.

And this has been the holding in the following cases all involving subcontractors: Louisiana Fire Ins. Co. v. Royal Indemnity Co. et al. [(1949), 38 So. 2d 807.]; New Amsterdam Casualty Co. v. Homans-Kohler, Inc. [(1969), 305 F. Supp. 1017.]; Transamerica Insurance Co. v. Gage Plumbing and Heating Co. [(1970), 433 F. 2d 1051.]; United States Fire Insurance Co. v. Beach [(1973), 275 So. 2d 473 (La. C.A.)., The only dissenting voice is to be found in Texas in McBroome-Benett Plumbing, Inc. v. Villa France, Inc. [(1974), 515 S.W. 2d 32.], where the facts may well be distinguished.

In England, the question does not appear have been litigated. It is interesting to note, however, that MacGillivray, Insurance Law, 6th ed., 1975, appears to accept the authority of the American cases, two of which: General Insurance Co. of America v. Stoddard Wendle Ford Motors and New Amsterdam Casualty Co. v. Homans-Kohler Inc., above, are mentioned in footnote 76 to s. 1916, at p. 804. MacGillivray writes in that section:

> The fact that the policy is in joint names will almost invariably mean that both parties are intended to benefit and that there is no scope for subrogation.

For these reasons, I conclude that Commonwealth was an insured whose insurable interest extended to the entire works prior to the loss so that, accordance with the basic principles, the insurers had no right of subrogation.

II

Although my conclusion on the first issue is a full answer to the action, I shall also express my thoughts on the second issue. It is trite law that even if insurers in principle have a subrogation right in a given case, they may renounce that right. In my view, such is the situation in the case at bar.

General condition 2 of the policy under the heading "Subrogation" reads:

> In the event of any payment under this Policy, Insurers shall be subrogated to all the Insured's rights of recovery therefore, and the Insured shall execute all papers required, and shall do everything that may be necessary to secure such rights, but Insurers shall have no right of subrogation against any subsidiary or Allied

> Company owned or controlled by the Insured nor against any person, firm or corporation in respect of which the Insured has assumed liability under any contract or agreement.

The words I have underlined refer to the entire group called "the insured", which group includes Imperial, Wellman-Lord and Commonwealth. It is to the rights of this group that the insurers shall be subrogated, not to the rights of some members of this group against another member of the same group.

This is in accord with other clauses of the policy which spell out that the payments in case of loss are not to be made to one insured individually but to the group called "the insured". Clause 16 spells this out and clause 10 adds that all payments shall be made "to the Insured within thirty (30) days after filing proof of loss".

That the expression "the insured" refers to the group and only to the group is made clearer, if possible, by several other clauses of the policy. When referring to Imperial, general condition 5 quoted previously uses the word "owner" whereas endorsement No. 2 refers to the owner as an assured". The same general condition 5, para.1 refers to "any and all Contractors who heretofore or hereafter enter into a contract with the Owner, or other insured contractor" and then states, in para. 2, that all persons thus qualifying "as insureds" become "an insured" on the respective dates of their contract.

The last lines of general condition 2 quoted above bring me to the same conclusion: no right subrogation will exist against any subsidiary of "the insured". If the words receive their ordinary meaning, no subsidiary of Commonwealth could be made to defend a suit. Still, the insurers contend that Commonwealth itself can be asked to repay the damages. To go around the plain meaning of the text, the insurers have to say that in the context, the words "the insured" refer only to the owner and to the general contractor, a suggest reading that I cannot accept.

It follows that the clause upon which the insurers rely to claim subrogation in the case at bar does not support their contention. By that clause the policy makes it clear that it is only to the rights of the group against outside parties that the insurers are entitled to proceed by way of subrogation.

The conclusion I have expressed is based on ordinary reading of the subrogation clause as well as on the general text of the policy. In my eyes, it also conforms to the intent of the drafters of this type of insurance, as well as to the intent of the parties to the construction contract in the case at bar.

As already noted, the multi-peril policy under consideration is called in the contract between Imperial and Wellman-Lord a course of construction insurance. In England, it is usually called "Contractors' all risks insurance" and in the United States, it is referred to as "Builders' risk policy". Whatever its label, its function is to provide to the owner the promise that the contractors will have the funds to rebuild in case of loss and to the contractors the protection against the crippling cost of starting afresh in such an event, the whole without resort to litigation in case of negligence by anyone connected with the construction, a risk accepted by the insurers at the outset.This purpose recognizes the importance of keeping to minimum the difficulties that are bound to be created by the large number of participants in a major construction project, the complexity of which needs no demonstration. It also recognizes the realities of industrial life. In Morris v. Ford Motor Co. Ltd. [[1973] 2 All E.R. 1084.], the majority in the Court of Appeal refused to accept the existence of subrogated rights because in the words of Lord Denning, it was not just and equitable to compel the

insured to lend their name to an action against their own servant and, in the words of James L.J., such a subrogation in an industrial setting was unacceptable and unrealistic. As I see it, the drafters of the type of policy with which we are here concerned were clear-sighted enough to achieve this result before any judicial pronouncement on the subject.

And this was the intent of all the parties to the construction contracts, namely Imperial, Wellman-Lord and Commonwealth. A finding on this point was made by the trial judge when he said:

> No demand was made by the Plaintiffs on the Defendant for the resulting damage. It was thought by everyone at the time to be an insurance claim and was treated accordingly.

The insurers submit that no such intention existed. They establish a parallel between the liability insurance requirements in the main construction contract and that in the subcontract; they point out that in the former the policy is to stipulate that the owner will be deemed to be a member of the public but that no coverage will exist "for loss to the work under the contract" whereas in the latter, no such exclusion is mentioned. They also stress that a course of construction policy insuring the work to full value in the joint names of the contractor and the owner will be obtained, whereas the subcontract makes no reference to any property insurance. The short answer to that submission is

a) that Imperial, by its conduct when it obtained property insurance in favour of all concerned wherein the contractor and the sub-contractors were put on the same footing, gave its true meaning to the arrangement relating to property insurance;
b) that in such a context, there was no need to repeat in the subcontract the statement found in the main contract that the policy of liability insurance would not provide indemnity "for loss to the work under the contract",

in addition to which it would be astonishing to find that the owner, when turning its thought to liability insurance, would insist upon a protection of $1,000,000 excluding the work under construction in the case of the contractor but would be satisfied with a coverage of $300,000 including that work in the case of the subcontractor.

The insurers have submitted that this reading of the contractual agreements between owner, contractor and subcontractor is negated by para. 17 of the subcontract:

> LIABILITY FOR DAMAGES: -- In cases of damage by the Sub-Contractor to the work of others engaged on the project or of damage to the Sub-Contractor's work by others, the parties involved shall agree promptly regarding the making of necessary repairs and the assumption of repair cost. Such repairs shall be made in a manner satisfactory to the Contractor and the Contractor may require, in order to assure proper workmanship, or to prevent delays, or in cases where responsibility is in dispute or cannot be determined, that repairs be made by the party whose work has been damaged and said party shall comply at his own expense and secure recompense, by such proper means as may be available from only the party or parties at fault.

That submission goes beyond the words of the text. The main purpose of that paragraph is to ensure that in case of damage, the general contractor will be in a position to have the repairs done promptly. That paragraph does not negate the basic proposition that everyone involved in the construction of the project will be insured under a policy issued to all as a group. The reference to fault occurs because this policy stipulates a deductible of $10,000 and because it contains a number of exclusions, e.g. error in design and latent defect that reference has no other purpose.

For all these reasons, I would allow the appeal, set aside the judgment of the Appellate Division of the Supreme Court of Alberta and restore the judgment at trial, with costs throughout.

Appeal allowed with costs.

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TAB 2

Indexed as:

Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.

Fraser River Pile & Dredge Ltd., appellant;
v.
Can-Dive Services Ltd., respondent.

[1999] 3 S.C.R. 108

[1999] S.C.J. No. 48

File No.: 26415.

Supreme Court of Canada

1999: February 25 / 1999: September 10.

Present: Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (46 paras.)

Contracts -- Privity of Contract -- Insurance policy -- Doctrine of principled exception to privity of contract -- Insurance policy including waiver of subrogation -- Coverage extending to charterers -- Charterer negligent in sinking of barge -- Barge owner recovering for loss and agreeing to sue charterer -- Whether charterer can rely on waiver of subrogation clause to defend against subrogated action initiated by barge owner's insurers on basis of principled exception to the privity of contract doctrine.

A barge owned by the appellant sank while chartered to the respondent. The appellant's insurance policy included clauses waiving subrogation and extending coverage to affiliated companies and charterers. The insurers paid the appellant the fixed amount stipulated in the policy for the loss of the barge. The appellant made a further agreement with the insurers to pursue a negligence action against the respondent and to waive any right to the waiver of subrogation clause. The negligence action against the respondent was allowed at trial, and dismissed on appeal. At issue here is whether a third-party beneficiary can rely on a waiver of subrogation clause to defend against a subrogated action on the basis of a principled exception to the privity of contract doctrine.

[page109]

Held: The appeal should be dismissed.

As a general rule the doctrine of privity provides that a contract can neither confer rights nor impose obligations on third parties. Consequently, a third-party beneficiary would normally be precluded from relying on the terms of the insurance policy between the barge owner and its insurers. Given the circumstances of this appeal, however, a principled exception to the privity doctrine applies. A new exception is dependent upon the intention of the contracting parties. This intention is determined on the basis of two critical and cumulative factors: (a) the parties to the contract must intend to extend the benefit to the third party seeking to rely on the contractual provision; and (b) the activities performed by the third party seeking to rely on the contractual provision must be the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, as determined by reference to the intentions of the parties.

The first condition for the requisite intention was met, given that the waiver of subrogation clause expressly referred to a class of intended beneficiaries whose membership included the respondent. That clause was not conditional on the appellant's initiative in favour of any particular third-party beneficiary and can be enforced by the respondent acting independently. The appellant's agreement with the insurers to pursue legal action against the respondent did not effectively delete the third-party benefit from the contract. The parties' freedom of contract was not restricted because the agreement between the appellant and the insurers was concluded after the respondent's inchoate right crystallized into an actual benefit. At that point, the respondent became a party to the initial contract for the limited purpose of relying on the waiver of subrogation clause, and the appellant and the insurers cannot unilaterally revoke the respondent's crystallized rights. The second requirement for relaxing the doctrine of privity was also met. The relevant activities arose in the context of the very activity anticipated in the policy pursuant to the waiver of subrogation clause. That clause was not contained in an unrelated contract that did not pertain to the charter contract.

Sound policy reasons exist for relaxing the doctrine of privity in these circumstances. Such an exception establishes a default rule that closely corresponds to commercial reality. When sophisticated commercial parties enter into a contract of insurance which expressly [page110] extends the benefit of a waiver of subrogation clause to an ascertainable class of third-party beneficiaries, any conditions purporting to limit the extent of the benefit must be clearly expressed. Relaxing the doctrine of privity here would not introduce significant change to the law which would be better left to the legislature. The factors supporting the incremental nature of the exception were present. The appellant's concerns regarding the potential for double recovery were unfounded as the respondent cannot rely on any provision in the policy to establish a separate claim.

Cases Cited

Applied: London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299; disapproved: Vandepitte v. Preferred Accident Insurance Corp. of New York, [1933] A.C. 70; considered: Commonwealth Construction Co. v. Imperial Oil Ltd., [1978] 1 S.C.R. 317; referred to: Scott v. Wawanesa Mutual Insurance Co., [1989] 1 S.C.R. 1445; Thomas & Co. v. Brown (1899), 4 Com. Cas. 186; Watkins v. Olafson, [1989] 2 S.C.R. 750; R. v. Salituro, [1991] 3 S.C.R. 654.

APPEAL from a judgment of the British Columbia Court of Appeal (1997), 39 B.C.L.R. (3d) 187, 98 B.C.A.C. 138, 161 W.A.C. 138, 47 C.C.L.I. (2d) 111, [1998] 3 W.W.R. 177, [1997] B.C.J. No. 2355 (QL), allowing an appeal from a judgment of Warren J. (1995), 9 B.C.L.R. (3d) 260, 33 C.C.L.I. (2d) 9, [1995] 9 W.W.R. 376, [1995] B.C.J. No. 1611 (QL). Appeal dismissed.

David F. McEwen, for the appellant.
D. Barry Kirkham, Q.C., and Gregory J. Tucker, for the respondent.

Solicitors for the appellant: McEwen, Schmitt & Co., Vancouver.
Solicitors for the respondent: Owen, Bird, Vancouver.

The judgment of the Court was delivered by

1 **IACOBUCCI J.**:-- This appeal concerns the application of the doctrine of privity of contract to a waiver of subrogation clause in a contract of insurance.

[page111]

I. Facts

2 This action arose subsequent to the sinking of the derrick barge "Sceptre Squamish", owned by the appellant, Fraser River Pile & Dredge Ltd. ("Fraser River") and, at the time of loss, under charter to the respondent, Can-Dive Services Ltd. ("Can-Dive"). Can-Dive was held liable at trial for damages in the amount of $949,503. In appealing the trial decision, Can-Dive does not dispute that the loss resulted from its negligence, but contends that it cannot be held liable in what is in effect a subrogated action by the underwriters of Fraser River's insurance policy.

3 Fraser River carries on business as a provider of dredging, pile-driving and related services. It owns approximately 50 vessels which it uses for these purposes. Occasionally, Fraser River charters vessels for which it has no immediate use to others. In 1990, Can-Dive undertook work as a sub-contractor on a natural gas pipeline under construction between Vancouver Island and the mainland of British Columbia. In order to carry out the work required, Can-Dive contracted with Fraser River to charter the "Sceptre Squamish", and arranged for Fraser River's personnel to operate the crane and winches on board. The charter contract also included a flat scow. Can-Dive assumed full responsibility for towing the barge to and from the work site, and for maintaining the safety and condition of the barge. The "Sceptre Squamish" was towed to the work site on October 30, 1990, where it remained until sinking in stormy weather on the night of November 16, 1990.

4 At all material times during the charter of the "Sceptre Squamish" and its subsequent loss, Fraser River was insured under a Hull Subscription Policy (the "policy"), dated June 28, 1990. Following the loss of the vessel and its equipment, Fraser River recovered from the insurers the sum of

$1,128,365.57, being the fixed amount stipulated in the policy to cover such loss. On June 4, 1991, Fraser River and the insurers entered into a further [page112] agreement, setting out their joint intention to pursue a legal action against Can-Dive in negligence for the sinking of the "Sceptre Squamish". The preamble of the agreement included the following terms:

> C) The Underwriters have agreed to pay the claims (the claims) of F.R.P.D. for the loss of the barge and crane and the Underwriters wish to proceed with legal action against Can-Dive Services Ltd. and possibly others to recover part or all of their payments;
>
> D) F.R.P.D. has agreed to waive any right it may have pursuant to the waiver of subrogation clause in the aforesaid policy with respect to Can-Dive Services Ltd... .

5 Fraser River subsequently commenced this action in June 1991 to recover damages for its losses arising from the sinking of the derrick barge. Can-Dive not only denied that it was negligent, but argued as well that the action was a subrogated action conducted by and for the sole benefit of the insurers, i.e., that as Fraser River had received payment from the insurers in the amount specified in the policy (which exceeded the actual value of the loss by a little over $300,000), the claim was wholly subrogated, notwithstanding that it was initiated by Fraser River. Accordingly, the insurers were precluded from proceeding against Can-Dive on the basis that the company was included within the category of "Additional Insureds" as defined in the terms of the policy as follows:

> GENERAL CONDITIONS
>
> 1. ADDITIONAL INSUREDS CLAUSE
>
> It is agreed that this policy also covers the Insured, associated and affiliated companies of the Insured, be they owners, subsidiaries or interrelated companies and as bareboat charterers and/or charterers and/or sub-charterers and/or operators and/or in whatever capacity and shall so continue to cover notwithstanding any provisions of this Policy with respect to change of ownership or management. Provided, however, that in the event of any claim being made by [page113] associated, affiliated, subsidiary or interrelated companies under this clause, it shall not be entitled to recover in respect of any liability to which it would be subject if it were the owner, nor to a greater extent than an owner would be entitled in such event to recover.
>
> ...
>
> Notwithstanding anything contained in the Additional Insureds Clause above, it is hereby understood and agreed that permission is hereby granted for these vessels to be chartered and the charterer to be considered an Additional Insured hereunder.
>
> ...
>
> Trustee Clause

> It is understood and agreed that the Named Insured who obtained this Policy did so on his own behalf and as agent for the others insured hereby including those referred to by general description.

6 In the alternative, Can-Dive claimed that, assuming it was not included in the policy under the category of "Additional Insureds", the insurers had nonetheless expressly waived any right of subrogation it may have held against the defendant, pursuant to the waiver of subrogation clause which read as follows:

> 17. SUBROGATION AND WAIVER OF SUBROGATION CLAUSE
>
> In the event of any payment under this Policy, the Insurers shall be subrogated to all the Insured's rights of recovery therefor, and the Insured shall execute all papers required and shall do everything that may be necessary to secure such rights, but it is agreed that the Insurers waive any right of subrogation against:
>
> ...
>
> (b) any charterer(s) and/or operator(s) and/or lessee(s) and/or mortgagee(s)... .

[page114]

II. Judgments Below

A. Supreme Court of British Columbia (1995), 9 B.C.L.R. (3d) 260

Warren J.

7 Having found that Fraser River's loss was owing to Can-Dive's negligence, Warren J. nonetheless agreed with Can-Dive that the action amounted to a subrogated claim, and went on to consider Can-Dive's defences based on the provisions of the policy. Can-Dive raised three defences: (a) that in agreeing to charter the "Sceptre Squamish" to Can-Dive, Fraser River agreed as well to extend its own insurance coverage under the policy to cover Can-Dive for the duration of the charter agreement; (b) that it came within the class of "Additional Insureds" as specified in the terms of the policy, thereby precluding the insurers from proceeding in a subrogated action against their own insured; and (c) that the insurers expressly waived a right of subrogation against Can-Dive as a "charterer" pursuant to a waiver of subrogation clause contained in the policy.

8 As to Can-Dive's claim that insurance coverage under Fraser River's policy was a term of the charter agreement, Warren J. held that there was insufficient clear and cogent evidence to enable him to conclude on a balance of probabilities that Fraser River agreed to extend its own insurance to cover any risk of loss by Can-Dive during the charter period. Warren J. also rejected Can-Dive's claim that the insurers were precluded from bringing a subrogated action against the company on the basis that Can-Dive, as a "charterer", came within the contractual definition of "Additional Insureds". Warren J. noted that, for this argument to succeed, Can-Dive would have to rely on a con-

tractual term in the policy, and therefore must first overcome the doctrine of privity of contract which generally [page115] provides that a stranger to a contract may neither enforce nor rely on its terms.

9 Warren J. next considered Can-Dive's submission that, notwithstanding its status as a third party to the contract, the insurers were bound by the waiver of subrogation clause contained therein as the doctrine of privity of contract does not apply in circumstances where a third-party beneficiary relies on the waiver to defend against an action initiated by the insurers. Having reviewed the existing jurisprudence purporting to deal with privity of contract in this context, and relying in particular on the decision of the Privy Council in Vandepitte v. Preferred Accident Insurance Corp. of New York, [1933] A.C. 70, Warren J. concluded that the doctrine was still applicable except to the extent it was incrementally abrogated through the creation of specific judicial exceptions, or more substantively, through legislative reform, as has generally been the case with automobile insurance legislation. He held that the Court's decision in London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, was controlling on this issue; a waiver of subrogation clause, as with any other contractual provision, is subject to the doctrine of privity unless a traditional exception applies, or sufficient reason exists to relax the doctrine in the given circumstances. Warren J. held that relaxing the doctrine of privity of contract in the present circumstances would alter the doctrine in excess of the incremental changes contemplated by the reasoning in London Drugs.

10 Finally, Warren J. considered whether Can-Dive could avail itself of the principles of either trust or agency established in the case law as potential exceptions to the doctrine of privity of contract. He quickly dismissed the application of trust principles, concluding that the policy did not reveal any intention that Fraser River was acting as trustee on Can-Dive's behalf in contracting for insurance coverage. As to the agency exception, Warren J. first noted that Fraser River, as the purported agent for Can-Dive, must have intended to act on behalf of Can-Dive as the principal or as a member of an [page116] ascertainable class of principals. As he was of the opinion that the case could be decided on other grounds, Warren J. was prepared to assume for the purposes of argument that the requisite intention was present.

11 The more significant obstacle in applying principles of agency, however, was the requirement of ratification. Warren J. held that to gain the benefit of the policy, Can-Dive as principal would have to ratify the actions taken by Fraser River in acting on its behalf to arrange for the policy to cover Can-Dive as within the class of "Additional Insureds". Subsequent ratification involves three initial requirements: (a) the purported agent must have represented to the third party that he or she was acting on behalf of the purported principal; (b) the purported principal must have been competent at the time the act was done; and (c) the purported principal must be legally capable of completing the act at the time of ratification. Warren J. concluded that the three initial requirements were met in these circumstances. The first criterion was satisfied by the inclusion of the "Trustee Clause", indicating to the insurers that Fraser River may be acting as agent on behalf of certain unnamed parties who might later ratify the act and become "Additional Insureds" under the policy. Both the second and third criteria were satisfied by the status of Fraser River and Can-Dive as capable, juridical persons at all material times.

12 Assuming that these initial hurdles were overcome, there still remained, however, as a final requirement an actual act of ratification, whether express or by implication. Warren J. concluded that Can-Dive's only act of ratification was amending its Statement of Defence upon learning of the existence of the policy and its potential scope of coverage. While Warren J. did not find that

Can-Dive was precluded from ratifying its inclusion as an "Additional Insureds" under the terms of the policy subsequent to the time at which the loss occurred, he held that the opportunity for ratification was extinguished when Fraser River [page117] and the insurers entered into an agreement in June 1991 to pursue a claim against Can-Dive for damages. The effect of this agreement was to change the terms of the policy, given that an action against Can-Dive would have been fundamentally incompatible with the existing scope of the "Additional Insureds" clause. Accordingly, no effective ratification of the policy could have occurred subsequent to this date.

13 Also fatal to Can-Dive's claim was Warren J.'s finding that, even assuming that the requirements of ratification had been met, no consideration flowed from Can-Dive to the insurers; the mere act of chartering Fraser River's vessel was insufficient to amount to consideration for the purposes of concluding that agency principles applied to deem Can-Dive a legal party to the contract between Fraser River and the insurers. In the result, Fraser River's action in negligence was allowed.

B. Court of Appeal for British Columbia (1997), 39 B.C.L.R. (3d) 187

Esson, Huddart and Proudfoot JJ.A.

14 Esson J.A., writing for the court, agreed that the claim was wholly subrogated, noting that Fraser River had already received from the insurers the amount fixed in the policy, a sum which exceeded Fraser River's actual losses by over $300,000. He rejected Can-Dive's submission, however, that the trial judge was in error in finding that Fraser River did not covenant to insure Can-Dive as a term of the charter agreement. Instead, Esson J.A. chose to decide the appeal on the basis of the waiver of subrogation clause contained in the policy and the principles of the doctrine of privity of contract.

15 Esson J.A. first considered whether Can-Dive, as a stranger to the contract of insurance between Fraser River and the insurers, could rely on the waiver of subrogation clause to defend against the subrogated action. He disagreed with the trial [page118] judge's conclusion on this point, holding instead that Vandepitte, supra, had been impliedly overruled by the Supreme Court of Canada on the basis that the precedent had been ignored in cases where it might well have applied: see, for example, Scott v. Wawanesa Mutual Insurance Co., [1989] 1 S.C.R. 1445, where the Court held, without any reference to the doctrine of privity of contract, that the named insured's son came within the class of "Insured" as defined in the homeowner's policy. Esson J.A. also noted that soon after Vandepitte had been decided, its potential impact on contracts for automobile insurance was abrogated in every relevant jurisdiction. In his opinion, the decision was not good law, as it had either been overtaken by legislation, as in the case of automobile insurance, or largely ignored in favour of reasoning which better reflected commercial reality.

16 Apart from referring to the implicit overruling of Vandepitte, Esson J.A. also concluded that judicial authority supported Can-Dive's submission that "waiver of subrogation" clauses in contracts of insurance constituted an exception to the doctrine of privity of contract in circumstances where the third-party beneficiary is not a party to the policy, but nonetheless falls within the contractual definition of those to whom coverage is extended. In Commonwealth Construction Co. v. Imperial Oil Ltd., [1978] 1 S.C.R. 317, for example, subcontractors who were not parties to a builder's risk policy, but who met the definition of a "Contractor" for the purposes of coverage, were able to overcome the doctrine of privity of contract. In holding that subrogation was not available against the subcontractor, de Grandpré J. relied upon the nature of the relationship amongst the various contractors on a construction site, i.e., that the parties were involved in a joint effort towards a

common goal. To give effect to the doctrine of privity of contract would be commercially unreasonable in these circumstances, in that any loss on the construction site caused by one of the parties would [page119] necessarily lead to litigation between the parties, contrary to the interest of the common enterprise. In addition to the builder's risk cases, Esson J.A. also identified an existing exception to the doctrine of privity of contract in insurance law more generally, originating in a line of authority dating back to a decision of Mathew J. in Thomas & Co. v. Brown (1899), 4 Com. Cas. 186.

17 Esson J.A. next considered whether this established exception, available in circumstances where a purported third-party beneficiary comes within the class of those to whom insurance coverage is extended, has nonetheless been overtaken by the Court's decision in London Drugs, supra. In other words, the exception in favour of waiver of subrogation clauses remains good law only to the extent that it does not contradict the legal principles or analytical framework set out in London Drugs. Esson J.A. held that an exception of this nature was entirely consistent on the basis that, if an insurer were to seek to avoid liability on the same grounds as were relied upon in Vandepitte, supra, under the more recent London Drugs analysis, it would fail. Many of the same considerations relevant to the disposition of London Drugs were applicable in the instant case, e.g., the third party or stranger to the contract was seeking to rely on a contractual provision to defend against an action, rather than seeking to enforce the terms of the contract on its own initiative against one of the original parties. Furthermore, it was expressly stated in London Drugs that nothing in the reasons should be taken as affecting in any way existing exceptions to the doctrine of privity of contract such as principles of trust or agency. Accordingly, as the jurisprudence in support of an exception to privity in favour of third-party beneficiaries falling within the contractual definition of the insured class for the purposes of the insurance policy had not been overtaken by the Court's decision in London Drugs, Esson J.A. concluded that Can-Dive could [page120] rely on the waiver of subrogation clause in the policy.

18 Esson J.A. was also of the view that Can-Dive could succeed on the basis of the agency exception. He found that the trial judge erred in failing to find a clear act of ratification by Can-Dive. Specifically, he did not agree with the trial judge's conclusion that Can-Dive's amendment to the pleadings in February 1994 could not amount to ratification on the basis that Fraser River and its insurers, by virtue of their agreement in June 1991 to proceed against Can-Dive, had effectively revised the terms of the policy so as to delete the provision granting third-party rights to Can-Dive. Esson J.A. held that while parties to a contract may subsequently delete provisions in favour of third-party beneficiaries, contractual terms providing protection against loss to third parties cannot be varied to the detriment of the third party after the occurrence of the very loss contemplated in the policy.

19 Accordingly, Esson J.A. allowed the appeal and dismissed the action against Can-Dive.

III. Issues

20 As noted above, this appeal concerns the question of whether a third-party beneficiary can rely on a waiver of subrogation clause contained in a contract of insurance to defend against a subrogated action initiated by the insurer. In the context of this appeal, this question raises the following issues:

a. Is Can-Dive, as a third-party beneficiary under the insurance policy pursuant to the waiver of subrogation clause, entitled to rely on that clause to defend against the insurer's subrogated [page121] action on the basis of the agency exception to the doctrine of privity of contract?

b. Is Can-Dive, as a third-party beneficiary under the insurance policy pursuant to the waiver of subrogation clause, entitled to rely on that clause to defend against the insurer's subrogated action on the basis of the principled exception to the privity of contract doctrine established by the Court's decision in London Drugs?

IV. Analysis

A. Is Can-Dive, as a third-party beneficiary under the insurance policy pursuant to the waiver of subrogation clause, entitled to rely on that clause to defend against the insurer's subrogated action on the basis of the agency exception to the doctrine of privity of contract?

21 The entirety of the dispute between the parties concerns the legal effect to be given to the waiver of subrogation contained in Clause 17 of the appellant Fraser River's contract of insurance, which reads as follows:

> 17. SUBROGATION AND WAIVER OF SUBROGATION CLAUSE
>
> In the event of any payment under this Policy, the Insurers shall be subrogated to all the Insured's rights of recovery therefor, and the Insured shall execute all papers required and shall do everything that may be necessary to secure such rights, but it is agreed that the Insurers waive any right of subrogation against:
>
> ...
>
> (b) any charterer(s) and/or operator(s) and/or lessee(s) and/or mortgagee(s)... .

22 The respondent Can-Dive is seeking to rely on the waiver of subrogation clause contained in the policy to defend against this subrogated action in negligence. As a general rule, however, the doctrine of privity provides that a contract can neither [page122] confer rights nor impose obligations on third parties. This appeal is concerned only with the former situation, namely, circumstances in which a third party is seeking to obtain a benefit or right established in its favour pursuant to the terms of the contract. The Court is not called on to address the situation in which a contract imposes obligations on a third party, and I stress that nothing in these reasons should be taken as applicable to the law in this area.

23 Although the doctrine of privity would normally be fatal to its case, Can-Dive submits that the principle of agency applies to deem Can-Dive a party to the contract in law, if not in fact, such that privity is no longer a concern. Because of the approach I intend to take to this case, I do not find it necessary to deal with the argument that Can-Dive may rely on the waiver of subrogation clause on this basis. In so stating, I do not wish to be taken as either agreeing or disagreeing with Esson J.A.'s conclusions on this issue. Instead, I prefer to adopt the approach set out in London Drugs, supra, and consider whether the doctrine of privity should be relaxed in these circumstances.

B. Is Can-Dive, as a third-party beneficiary under the insurance policy pursuant to the waiver of subrogation clause, entitled to rely on that clause to defend against the insurer's subrogated action on the basis of the principled exception to the privity of contract doctrine established by the Court's decision in London Drugs?

1. London Drugs and a Principled Exception to the Doctrine of Privity of Contract

24 As stated above, Can-Dive's position is that of a third-party beneficiary who normally would be precluded from enforcing or relying on the terms of the policy in effect between Fraser River and its insurers. Accordingly, it is necessary to consider the legal status of the waiver of subrogation clause in light of the Court's decision in London Drugs. [page123] In that case, the Court introduced what was intended as a principled exception to the common law doctrine of privity of contract.

25 At issue was the status of a limitation of liability clause in the standard form contract between the appellant and the respondent for storage of the appellant's transformer. The clause limited a "warehouseman's" liability on any one package to $40. While in storage, a transformer was damaged owing to negligence on the part of the respondent's employees. The appellant sued both the warehouse company and its employees, and the trial judge found the employees personally liable for the full amount of the damages. On appeal, the majority allowed the employees to rely on the limitation of liability clause in the employer's contract with the appellant, notwithstanding that the employees were not parties to this contract. The majority of the Court upheld the result on appeal, concluding that in circumstances where the traditional exceptions to privity of contract such as agency or trust do not apply, courts may nonetheless undertake the appropriate analysis, bounded by both common sense and commercial reality, in order to determine whether the doctrine of privity with respect to third-party beneficiaries should be relaxed in the given circumstances.

26 The Court devoted a great deal of attention to the judicial history and application of the doctrine of privity of contract as it relates to third-party beneficiaries, noting the extent of judicial discontent, legislative override, and a significant body of academic criticism. While acknowledging that privity of contract is an established doctrine of contract law, the Court concluded, at p. 423, that the concerns expressed regarding the application of the doctrine to third-party beneficiaries indicated that the time for judicial consideration in this particular context had arrived:

> These comments and others reveal many concerns about the doctrine of privity as it relates to third party [page124] beneficiaries. For our purposes, I think it sufficient to make the following observations. Many have noted that an application of the doctrine so as to prevent a third party from relying on a limitation of liability clause which was intended to benefit him or her frustrates sound commercial practice and justice. It does not respect allocations and assumptions of risk made by the parties to the contract and it ignores the practical realities of insurance coverage. In essence, it permits one party to make a unilateral modification to the contract by circumventing its provisions and the express or implied intention of the parties. In addition, it is inconsistent with the reasonable expectations of all the parties to the transaction, including the third party beneficiary who is made to support the entire burden of liability. The doctrine has also been

> criticized for creating uncertainty in the law. While most commentators welcome, at least in principle, the various judicial exceptions to privity of contract, concerns about the predictability of their use have been raised. Moreover, it is said, in cases where the recognized exceptions do not appear to apply, the underlying concerns of commercial reality and justice still militate for the recognition of a third party beneficiary right.

27 The respondent employees in London Drugs were unable to rely on existing principles of trust or agency. Rather than adapting these established principles to accommodate yet another ad hoc exception to the doctrine of privity, it was decided to adopt a more direct approach as a matter of principle. The Court held that, in circumstances where the traditional exceptions do not apply, the relevant functional inquiry is whether the doctrine should be relaxed in the given circumstances.

28 In order to distinguish mere strangers to a contract from those in the position of third-party beneficiaries, the Court first established a threshold requirement whereby the parties to the contract must have intended the relevant provision to confer a benefit on the third party. In other words, an employer and its customer may agree to extend, either expressly or by implication, the benefit of any limitation of liability clause to the employees. In the circumstances of London Drugs, the customer had full knowledge that the storage services contemplated by the contract would be provided [page125] not only by the employer, but by the employees as well. In the absence of any clear indication to the contrary, the Court held that the necessary intention to include coverage for the employees was implied in the terms of the agreement. The employees, therefore, as third-party beneficiaries, could seek to rely on the limitation clause to avoid liability for the loss to the customer's property.

29 The Court further held, however, that the intention to extend the benefit of a contractual provision to the actions of a third-party beneficiary was irrelevant unless the actions in question came within the scope of agreement between the initial parties. Accordingly, the second aspect of the functional inquiry was whether the employees were acting in the course of their employment when the loss occurred, and whether in so acting they were performing the very services specified in the contract between their employer and its customer. Based on uncontested findings of fact, it was clear that the damage to the customer's transformer occurred when the employees were acting in the course of their employment to provide the very storage services specified in the contract.

30 Taking all of these circumstances into account, the Court interpreted the term "warehouseman" in the limitation of liability clause to include coverage for the employees, thereby absolving them of any liability in excess of $40 for the loss that occurred. The Court concluded that the departure from the traditional doctrine of privity was well within its jurisdiction representing, as it did, an incremental change to the common law rather than a wholesale abdication of existing principles. Given that the exception was dependent on the intention stipulated in the contract, relaxing the doctrine of privity in the given circumstances did not frustrate the expectations of the parties.

2. Application of the Principled Exception to the Circumstances of this Appeal

31 As a preliminary matter, I note that it was not our intention in London Drugs, supra, to limit [page126] application of the principled approach to situations involving only an employer-employee relationship. That the discussion focussed on the nature of this relationship simply reflects the pru-

dent jurisprudential principle that a case should not be decided beyond the scope of its immediate facts.

32 In terms of extending the principled approach to establishing a new exception to the doctrine of privity of contract relevant to the circumstances of the appeal, regard must be had to the emphasis in London Drugs that a new exception first and foremost must be dependent upon the intention of the contracting parties. Accordingly, extrapolating from the specific requirements as set out in London Drugs, the determination in general terms is made on the basis of two critical and cumulative factors: (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

(a) Intentions of the Parties

33 As to the first inquiry, Can-Dive has a very compelling case in favour of relaxing the doctrine of privity in these circumstances, given the express reference in the waiver of subrogation clause to "charterer(s)", a class of intended third-party beneficiaries that, on a plain reading of the contract, includes Can-Dive within the scope of the term. Indeed, there is no dispute between the parties as to the meaning of the term within the waiver of subrogation clause; disagreement exists only as to whether the clause has legal effect. Accordingly, there can be no question that the parties intended to extend the benefit in question to a class of third-party beneficiaries whose membership includes Can-Dive. Given the lack of ambiguity on the face of the provision, there is no need to resort to extrinsic evidence for the purposes of determining otherwise. If the parties did not intend the waiver of subrogation clause to be extended to third-party [page127] beneficiaries, they need not have included such language in their agreement.

34 In essence, Fraser River's argument in terms of the intention of the parties is not that the scope of the waiver of subrogation clause does not extend to third parties such as Can-Dive, but that the provision can only be enforced by Fraser River on Can-Dive's behalf, and not by Can-Dive acting independently. A plain reading of the provision, however, does not support this conclusion. There is no language in the clause indicating that the waiver of subrogation is intended to be conditional upon Fraser River's initiative in favour of any particular third-party beneficiary. It appears to me that Fraser River has conflated arguments concerning the intentions of the parties in drafting the provision and the legal effect to be given to the provision. In no uncertain terms, the waiver of subrogation clause indicates that the insurers are precluded from proceeding with an action against third-party beneficiaries coming within the class of "charterer(s)", and the relevant inquiry is whether to give effect to these intentions by enforcing the contractual term, notwithstanding the doctrine of privity of contract.

35 In my opinion, the case in favour of relaxing the doctrine of privity is even stronger in the circumstances of this appeal than was the case in London Drugs, supra, wherein the parties did not expressly extend the benefit of a limitation of liability clause covering a "warehouseman" to employees. Instead, it was necessary to support an implicit extension of the benefit on the basis of the relationship between the employers and its employees, that is to say, the identity of interest between the employer and its employees in terms of performing the contractual obligations. In contrast, given the express reference to "charterer(s)" in the waiver of subrogation clause in the policy, there is

no need to look for any additional factors to justify characterizing [page128] Can-Dive as a third-party beneficiary rather than a mere stranger to the contract.

36 Having concluded that the parties intended to extend the benefit of the waiver of subrogation clause to third parties such as Can-Dive, it is necessary to address Fraser River's argument that its agreement with the insurers to pursue legal action against Can-Dive nonetheless effectively deleted the third-party benefit from the contract. A significant concern with relaxing the doctrine of privity is the potential restrictions on freedom of contract which could result if the interests of a third-party beneficiary must be taken into account by the parties to the initial agreement before any adjustment to the contract could occur. It is important to note, however, that the agreement in question was concluded subsequent to the point at which what might be termed Can-Dive's inchoate right under the contract crystallized into an actual benefit in the form of a defence against an action in negligence by Fraser River's insurers. Having contracted in favour of Can-Dive as within the class of potential third-party beneficiaries, Fraser River and the insurers cannot revoke unilaterally Can-Dive's rights once they have developed into an actual benefit. At the point at which Can-Dive's rights crystallized, it became for all intents and purposes a party to the initial contract for the limited purposes of relying on the waiver of subrogation clause. Any subsequent alteration of the waiver provision is subject to further negotiation and agreement among all of the parties involved, including Can-Dive.

37 I am mindful, however, that the principle of freedom of contract must not be dismissed lightly. Accordingly, nothing in these reasons concerning the ability of the initial parties to amend contractual provisions subsequently should be taken as applying other than to the limited situation of a third-party's seeking to rely on a benefit conferred by the contract to defend against an action initiated by one of the parties, and only then in circumstances where the inchoate contractual right has [page129] crystallized prior to any purported amendment. Within this narrow exception, however, the doctrine of privity presents no obstacle to contractual rights conferred on third-party beneficiaries.

(b) Third-Party Beneficiary is Performing the Activities Contemplated in the Contract

38 As to the second requirement that the intended third-party beneficiary must rely on a contractual provision in connection with the very activities contemplated by the contract in general, or by the relevant clause in particular, Fraser River has argued that a significant distinction exists between the situation in London Drugs, supra, and the circumstances of the present appeal. In London Drugs, the relationship between the contracting parties and the third-party beneficiary involved a single contract for the provision of services, whereas in the present circumstances, such a "contractual nexus", to use Fraser River's phrase, does not exist. In other words, the waiver of subrogation clause upon which Can-Dive seeks to rely is contained in an unrelated contract that does not pertain to the charter contract in effect between Fraser River and Can-Dive.

39 With respect, I do not find this argument compelling, given that a similar contractual relationship could be said to exist in London Drugs, in terms of the service contract between the parties and a contract of employment which presumably existed between the employer and employees. At issue is whether the purported third-party beneficiary is involved in the very activity contemplated by the contract containing the provision upon which he or she seeks to rely. In this case, the relevant activities arose in the context of the relationship of Can-Dive to Fraser River as a charterer, the very

activity anticipated in the policy pursuant to the waiver of subrogation clause. Accordingly, I conclude that the second requirement for relaxing the doctrine of privity has been met.

[page130]

(c) Policy Reasons in Favour of an Exception in These Circumstances

40 Having found that Can-Dive has satisfied both of the cumulative threshold requirements for the purposes of introducing a new, principled exception to the doctrine of privity of contract as it applies to third-party beneficiaries, I nonetheless wish to add that there are also sound policy reasons for relaxing the doctrine in these circumstances. In this respect, it is time to put to rest the unreasonable application of the doctrine of privity to contracts of insurance established by the Privy Council in Vandepitte, supra, a decision characterized since its inception by both legislatures and the judiciary as out of touch with commercial reality. As Esson J.A. noted, the decision in Vandepitte received little attention outside the field of automobile insurance, where it had been promptly overruled by legislative amendment in British Columbia and other provinces. In addition, Esson J.A. was correct in holding that Vandepitte has been impliedly overruled in the course of decisions by the Court, given that in cases where the rule of privity might have been applied, the decision was ignored: Scott, supra. Of particular interest is the Court's decision in Commonwealth Construction Co., supra. The case concerned a general contractor's "builder's risk" policy that purported to extend coverage to subcontractors who were not parties to the original contract. In holding that subrogation was not available against the subcontractors, de Grandpré J., writing for the Court, made the following comments regarding the "Additional Insureds" and "Trustee" clauses, at p. 324:

> While these conditions may have been inserted to avoid the pitfalls that were the lot of the unnamed insured in Vandepitte v. Preferred Accident Insurance Corpn. of New York [citations omitted], a precaution that in my view was not needed, they without doubt cover additional ground.

[page131]

41 When considered in light of the Court's discussion of the necessary interdependence of various contractors involved in a common construction enterprise, the comment reflects the Court's acknowledgment that the rule of privity set out in Vandepitte was inconsistent with commercial reality. In a similar fashion, Fraser River in the course of this appeal has been unable to provide any commercial reason for failing to enforce a bargain entered into by sophisticated commercial actors. In the absence of any indication to the contrary, I must conclude that relaxing the doctrine of privity in these circumstances establishes a default rule that most closely corresponds to commercial reality as is evidenced by the inclusion of the waiver of subrogation clause within the contract itself.

42 A plain reading of the waiver of subrogation clause indicates that the benefit accruing in favour of third parties is not subject to any qualifying language or limiting conditions. When sophisticated commercial parties enter into a contract of insurance which expressly extends the benefit of

a waiver of subrogation clause to an ascertainable class of third-party beneficiary, any conditions purporting to limit the extent of the benefit or the terms under which the benefit is to be available must be clearly expressed. The rationale for this requirement is that the obligation to contract for exceptional terms most logically rests with those parties whose intentions do not accord with what I assume to be standard commercial practice. Otherwise, notwithstanding the doctrine of privity of contract, courts will enforce the bargain agreed to by the parties and will not undertake to rewrite the terms of the agreement.

43 Fraser River has also argued that to relax the doctrine of privity of contract in the circumstances of this appeal would be to introduce a significant change to the law that is better left to the legislature. As was noted in London Drugs, supra, privity of contract is an established doctrine of contract law, and should not be lightly discarded through the process of judicial decree. Wholesale abolition of the doctrine would result in complex repercussions [page132] that exceed the ability of the courts to anticipate and address. It is by now a well-established principle that courts will not undertake judicial reform of this magnitude, recognizing instead that the legislature is better placed to appreciate and accommodate the economic and policy issues involved in introducing sweeping legal reforms.

44 That being said, the corollary principle is equally compelling, which is that in appropriate circumstances, courts must not abdicate their judicial duty to decide on incremental changes to the common law necessary to address emerging needs and values in society: Watkins v. Olafson, [1989] 2 S.C.R. 750, at pp. 760-61, and R. v. Salituro, [1991] 3 S.C.R. 654, at pp. 665-70. In this case, I do not accept Fraser River's submission that permitting third-party beneficiaries to rely on a waiver of subrogation clause represents other than an incremental development. To the contrary, the factors present in London Drugs, in support of the incremental nature of the exception, are present as well in the circumstances of this appeal. As in London Drugs, a third-party beneficiary is seeking to rely on a contractual provision in order to defend against an action initiated by one of the contracting parties. Fraser River's concerns regarding the potential for double recovery are unfounded, as relaxing the doctrine to the extent contemplated by these reasons does not permit Can-Dive to rely on any provision in the policy to establish a separate claim. In addition, the exception is dependent upon the express intentions of the parties, evident in the language of the waiver of subrogation clause, to extend the benefit of the provision to certain named classes of third-party beneficiaries.

V. Conclusion and Disposition

45 I conclude that the circumstances of this appeal nonetheless meet the requirements established in London Drugs for a third-party beneficiary to rely on the terms of a contract to defend against a claim [page133] initiated by one of the parties to the contract. As a third-party beneficiary to the policy, Can-Dive is entitled to rely on the waiver of subrogation clause whereby the insurers expressly waived any right of subrogation against Can-Dive as a "charterer" of a vessel included within the policy's coverage.

46 Accordingly, I would dismiss the appeal with costs.

cp/d/qlhbb

TAB 3

All England Official Transcripts (1997-2008)

Re Empire Paper Ltd (in liquidation)

Insolvency - Application to vary and admit to proof claim for interest and legal costs - Settlement Agreement permitting subrogated claims - Whether claim for interest is a subrogation claim or a claim in respect of a subrogation claim within the meaning of the terms of Settlement Agreement - Whether Rule 4.93 of the Insolvency Rules excludes from proof a claim for interest - Insolvency Act 1986, s 189.

(Transcript)

CHANCERY DIVISION

STANLEY BURNTON QC (sitting as a deputy Judge of the Chancery Division)

8 APRIL 1998

8 APRIL 1998

D Marks for the Applicant

L Hilliard for the Respondent

Paul Davidson Taylor; Taylor Joynson Garrett

STANLEY BURNTON QC

(sitting as a deputy Judge of the Chancery Division):

Introduction

Both the Applicant ('Excessvital') and Empire Paper Ltd ('Empire') are in creditors' voluntary liquidation.Excessvital is a shareholder of Empire, and the directors of Empire are the shareholders of Excessvital.Empire's liquidation began on 6 December 1993, and that of Excessvital on 1 February 1994.Both liquidations were originally insolvent.Excessvital is now solvent.Empire, however, remains insolvent.

On 18 August 1993, an agreement was entered into between BRS Ltd, Empire and Excessvital.Under that agreement, BRS undertook to provide warehouse and transport services for Empire.The charges payable by Empire to BRS were set out in clause 4.Excessvital entered into the agreement as guarantor of Empire, and by clause 16.1 guaranteed to BRS as principal obligor and not merely as surety the full and due performance by Empire of all its obligations under the agreement.It is nonetheless common ground that as between Excessvital and Empire, Excessvital was surety for Empire.

When Empire went into liquidation, it owed a substantial sum of money to BRS under that agreement.BRS (now called NFC (UK) Ltd, but which I shall refer to as BRS) was admitted to prove in Empire's liquidation in the sum of £400,000.It was also, of course, entitled to prove in the liquidation of Excessvital in respect of its liability as guarantor of Empire under the Agreement.

Excessvital claimed that Empire was substantially indebted to it.It sought to prove in Empire's liquidation for a sum of approximately £6.7 million.That sum was alleged to be made up of long term loan of £3.5 million, £2.35 of subordinated loan, and some £880,000 of other claims.

Excessvital's claims were compromised by a Settlement Agreement dated 29 March 1996.The Agreement recited that the Liquidators of Empire had admitted the BRS claim under the BRS Agreement to prove for the agreed sum of £400,000, defined as 'the Admitted Claim', and had paid an interim dividend of £100,000 on that claim.By the Settlement Agreement, Empire agreed to pay to Excessvital £1.75 million in full and final satisfaction of the claim in respect of the long term loan, and Excessvital waived any claim in relation to the other alleged indebtedness.However, clause 4 of the Agreement was as follows:

> "The Liquidators of (Empire) will accept further claims from Excessvital in the Liquidation of (Empire) in respect of any subrogated claims that Excessvital may have by virtue of it having paid to (BRS) either in full, or in part, the Admitted Claim as the guarantor of (Empire)."

In about June 1996, Empire's Liquidators paid a further £60,000 to BRS, leaving £240,000 outstanding out of the Admitted Claim of £400,000.BRS not surprisingly also claimed against Excessvital in its liquidation.As a result of the Settlement Agreement, and the payment of £1.75 million by the Liquidators of Empire to Excessvital, Excessvital became solvent.It paid to BRS the balance of the Admitted Claim, that is £240,000.BRS also claimed in the liquidation of Excessvital statutory interest pursuant to section 189 of the Insolvency Act 1986.The Liquidator of Excessvital paid £78,819.79 in respect of this interest claim, and now claims to be entitled to prove for that sum in the liquidation of Empire.

In addition, the Liquidator of Excessvital claims in the liquidation of Empire the sum of £3551.40, being the amount of legal costs incurred by him in connection with the liabilities to BRS.I shall refer to this claim in greater detail below.

The Liquidators of Empire rejected the proof of the Liquidator of Excessvital in respect of interest and legal costs.By this Application the Liquidator of Excessvital seeks to have the decision of the Liquidators of Empire varied so as to admit to proof the claim for interest and legal costs.

It was not, I think, disputed by Miss Hilliard for the Liquidators of Empire that but for the terms of the Settlement Agreement and the insolvent liquidation of Empire, Excessvital would be entitled to claim interest on any sum paid by it, as surety for Empire, to BRS, as the principal creditor, and to reimbursement of any legal costs properly and reasonably incurred as a result of the failure by Empire to meet its contractual obligations to BRS.Conversely, it was common ground that the only rights of Excessvital against Empire, following the execution of the Settlement Agreement, are those referred to in, and preserved by, clause 4 of that Agreement.

The principal issues before me are:

(a) Is Excessvital's claim in respect of interest within clause 4 of theSettlement Agreement?

(b) If it is, is it nonetheless excluded from proof by r 4.93 of theInsolvency Rules?

(c) Are the legal costs in question costs in respect of which Excessvitalwould be entitled to be indemnified by Empire apart from the provisions of the Settlement Agreement?

(d) If so, is the claim in respect of those costs within clause 4?

(a) The interest claim: clause 4 of the Settlement Agreement.

The claim relating to statutory interest arises because of the liquidation of Excessvital, the surety.It is a claim to be indemnified against the payment of interest made by its Liquidator to BRS.The interest was payable to Excessvital's creditors by virtue of section 189 of the Insolvency Act 1986.No such interest is presently payable by the Liquidators of Empire to its creditors, because there is no surplus remaining after payment of its debts; and there may well never be any such surplus.Thus the claim of Excessvital for statutory interest is not a claim which could have been made by BRS against Empire.Any claim by BRS against Empire for interest would have been a claim for contractual interest, if indeed it would have been payable under the BRS agreement.Any such claim would, of course, have been subject to r 4.93 of the Insolvency Rules.

Apart from the Settlement Agreement, Excessvital would doubtless have been entitled to be indemnified against its liability to pay interest to BRS, by reason of the surety's right to be indemnified by his principal debtor.But the right of indemnity is not a subrogation claim.A subrogation claim is a claim which the surety enjoys because, having paid off the creditor, he is entitled to the creditor's rights against the principal debtor.Excessvital would also have its own claim for interest on any sum paid by it to BRS; but such a claim would be subject to r 4.93.

Mr Marks referred me to section 5 of the Mercantile Law Amendment Act 1856.It confers rights of subrogation on a surety who pays the guaranteed debt, as a means of ensuring that he obtains from the principal debtor indemnification for advances made and loss sustained by him.However, it does not make the right of indemnity a right of subrogation: indemnity and subrogation are different and separate concepts and remedies, as Mr Marks accepted.

The purpose of clause 4 is clear.After the Settlement Agreement, there remained a substantial sum due to BRS from both Empire, as principal debtor, and Excessvital, as surety.It would have been quite unfair to have left the ultimate liability for that sum with the company from which BRS chose to claim it.It was therefore necessary to legislate for any sum which was thereafter paid by Excessvital in reduction or satisfaction of Empire's principal liability to BRS, to ensure that Excessvital retained a right to prove in respect of any such payment.

I was referred to some evidence as to the background of, and negotiations preceding, the Settlement Agreement.In my view it is neither relevant nor admissible.The Settlement Agreement falls to be construed on its terms, without resort to that evidence.

Mr Marks submitted that clause 4 extends beyond subrogation claims strictly so-called, and includes ancillary claims which are ' in respect of any subrogated claims that Excessvital may have by virtue of it having paid to (BRS) . . . the Admitted Claim as the guarantor of (Empire)'.He argued that the claim for interest was in respect of such a subrogated claim, since it related to the principal sum paid by Excessvital to BRS.

The difficulty with this argument is that it renders otiose much of clause 4.As I mentioned during argument, clause 4 might have been drafted without any mention of subrogated claims.The inclusion of those words must be given some significance.If one includes within the scope of the clause claims which are claims under the usual indemnity to which a surety is entitled, the words 'subrogation claims' lose all or the greater part of their significance.While the language of the clause is inelegant and imperfect, I construe it as confining further claims to subrogation claims.In my judgment, the claim for statutory interest is not a subrogation claim, nor a claim in respect of a subrogation claim within the meaning of the clause.It is a claim under the surety's right to be indemnified.

My conclusion is fortified by the fact that the interest claimed by BRS, and paid by Excessvital, was calculated on the entirety of the Admitted Claim of £400,000, taking into account reductions of the amount outstanding by the payments made by the Liquidators of both Empire and Excessvital: see the calculation at page 43 of the trial bundle.The claim by Excessvital to be indemnified against this interest cannot, in my view, be a claim 'Excessvital may have by virtue of it having paid to (BRS) either in full, or in part, the Admitted Claim as the guarantor of (Empire)'.The claim for interest does not arise by virtue of payment of the Admitted Claim, in full or in part, but by virtue of the payment by Excessvital of statutory interest.As was pointed out during the hearing, a claim for subrogation arises only on payment in full of the guaranteed debt.Clause 4 envisages that Excessvital may have a subrogation claim arising on part payment of the Admitted Claim of BRS.I do not consider this a sufficient reason to depart from what would otherwise be my interpretation of the clause,

particularly given the qualified reference to the claims of Excessvital (claims that it may have).It follows that Excessvital's claim in respect of interest was rightly rejected from proof.

(b) The claim for interest: r 4.93 of the Insolvency Rules.

My conclusion that the claim in respect of interest is outside clause 4 is I think supported by the provisions of section 189 of the Insolvency Act 1986 and of r 4.93 of the Insolvency Rules.It has long been the law that a surety who would otherwise be entitled to interest on the debt which he has discharged is, in the event of the bankruptcy or insolvent liquidation of the principal debtor, entitled to such interest only to the date of the adjudication or the commencement of liquidation: *Re International Contract Company* (1872) LR 13 Eq 623; *Re Humber Ironworks and Shipbuilding Company* (1869) LR 4 Ch Appellant 643.Consistently with this, in *Ex p Bishop* (1880) 15 Ch D 40O, the claim by the sureties was restricted to interest up to the date of adjudication.I was referred by Mr Marks to the Australian decision in *McColl's Wholesale Pty Ltd v State Bank of NSW* [1984] 3 NSWLR 365, but it appears from the judgment in that case that the position is the same in Australia: see the passage at 378F-379B.It is to be noted that in *Re International Contract Company* the claim which was rejected was not for contractual or equitable interest, but for an indemnity against interest which the surety had actually paid.That case was therefore analogous to the present.

Rule 4.93 of the Insolvency Rules is as follows:

> "4.93.Interest
>
> (1) Where a debt proved in the liquidation bears interest, that interest is provable as part of the debt except in so far as it is payable in respect of any period after the company went into liquidation.
>
> (2) In the following circumstances the creditor's claim may include interest on the debt for periods before the company went into liquidation, although not previously reserved or agreed.
>
> (3) If the debt is due by virtue of a written instrument, and payable at a certain time, interest may be claimed for the period from that time to the date when the company went into liquidation.
>
> (4) If the debt is due otherwise, interest may only be claimed if, before that date, a demand for payment of the debt was made in writing by or on behalf of the creditor, and notice given that interest would be payable from the date of the demand to the date of payment.
>
> (5) Interest under paragraph (4) may only be claimed for the period from the date of the demand to that of the company's going into liquidation [and for all the purposes of the Act and the Rules shall be chargeable at a rate not exceeding that mentioned in paragraph (6).
>
> [(6) The rate of interest to be claimed under paragraphs (3) and (4) is the rate specified in section 17 of the Judgments Act 1838 on the date when the company went into liquidation.]

The terms of the rule are too clear to require comment.In this case, the claim for interest is for interest for the period after Empire went into liquidation.

I was initially of the view that Rule 4.93 clearly and expressly excluded the claim of Excessvital in relation to interest, since the interest in question related to the period after Empire's liquidation.On this basis, the Rule continues the position as laid down in *Re International Contract Company*.On reflection, I am less certain.Excessvital does not assert that its debt carries the interest it claims; it asserts that the interest it paid to BRS is part of its debt.However, if the claim is admissible, Rule 4.93 has reversed the law as set out in *Re International Contract Company*; and there is nothing to indicate that such a change was intended.Furthermore, if Rule 4.93 is not effective to exclude such a claim, there is an undesirable and in my view unjustified distinction between a surety who has paid interest for a period after the date of liquidation, for which he seeks reimbursement, and other creditors, who may well have had to pay interest on their debt to their bank or other financier, and who in any event suffer an interest loss on their unpaid debt.In view of my conclusion as to the effect of clause 4 of the Settlement Agreement, it is unnecessary for me to reach a final conclusion on this point; but I should have been reluctant to decide that there is such a distinction.

(c) Legal costs: would Excessvital be entitled to indemnity apart from the Settlement Agreement?

The circumstances relating to the legal representation of Excessvital are curious.At the date of the Settlement Agreement, its Liquidator was advised by Eversheds, who also advised BRS.As mentioned above, the Settlement Agreement refers to the liability of Empire to BRS as 'the Admitted Claim', which is for 'the agreed sum of £400,000', without any suggestion that it might be contentious so far as Excessvital or its directors were concerned.It is true that the Settlement Agreement does not purport to bind Excessvital to accept or to agree the Admitted Claim; but its Liquidator did in fact subsequently accept it.However, it appears that following the conclusion of the Settlement Agreement, the Liquidator of Excessvital instructed other solicitors, namely Paul Davidson Taylor, 'in relation to the validation of the claim by BRS and, if valid, the proper quantum of that claim' (see Mr Cook's affidavit at paragraph 4).Mr Cook, the solicitor within Paul Davidson Taylor dealing with the matter, deposed that he 'considered my task to be to advise both on the enforceability of the guarantee against the Applicant and on the justification of the amount of the claim.' For this work, he charged his client £2,020 plus VAT.

In paragraph 8 of his affidavit, Mr Cook deposed:

> "Subsequently my clients asked for advice in relation to the payment of statutory interest and the recoverability of all the sums paid to BRS from the Respondent . . ."

For this advice, the Respondent was charged £1,531.40 plus VAT.

No other information has been given as to the details or nature of the advice given to the Liquidator of Excessvital, other than that 'these costs related directly and exclusively to the provision of advice to my clients on the proper treatment of the BRS claim'.

Reasonable legal costs are recoverable by a surety from the principal debtor as damages for breach of the contract of indemnity: *Howard v Lovegrove* (1870) LR 6 Exch. 43.In order to be recoverable from the principal debtor, the costs in question must have been caused by the default of the princi-

pal debtor: *Pierce v Williams* (1854) 23 LJ Ex 322.Costs incurred by the surety purely in his own interests are not recoverable as such damages.

On the sparse information before me, it seems that the advice referred to in paragraph 8 of Mr Cook's affidavit related to Excessvital's own position, and for its benefit alone, so that the costs of that advice are not recoverable from Empire.

I find the position in relation to the earlier advice more difficult, particularly in the light of the curious history of the legal representation of Excessvital referred to above.On balance, on the information before me I consider that some at least of these costs would be recoverable but for the terms of the Settlement Agreement.A surety is entitled to be reimbursed by the principal debtor the costs reasonably incurred by him in investigating the validity and quantum of the creditor's claim against the principal debtor and himself; and I do not think that the insolvent principal debtor's admission of the creditor's claim necessarily deprives the surety of the right to be reimbursed for the costs of his own investigation and advice.Whether, however, the surety is entitled to the costs of investigating the enforceability of the guarantee is more doubtful.Such costs seem to me to be incurred for the benefit of the surety alone.

Accordingly, but for the terms of the Settlement Agreement, I should have held that only part of the bill for £2,200 was provable, and that the second bill was correctly excluded from proof.

(d) Legal costs: the effect of clause 4 of the Settlement Agreement

The claim for legal costs is not a subrogated claim.It is not a claim of the creditor which has passed to the surety.It is the surety's own claim for damages for breach of the implied contract between him and the principal debtor.

The claim does relate to a subrogated claim, in that it relates to or arises out of the liability of the surety to the creditor.However, in the present case, this claim does not arise 'by virtue of (Excessvital) having paid to NFC' any sum: it is quite independent of any such payment.In my view, the claim is not 'in respect of any subrogated claims that Excessvital may have by virtue of it having paid to (BRS) either in full, or in part, the Admitted Claim as the guarantor of (Empire)' within the meaning of clause 4.

Conclusion

It follows that the decision of the Liquidator of Empire was correct and that this Application fails.

Judgment accordingly.

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Time Of Request: Thursday, July 18, 2013 13:10:41

TAB 4

Indexed as:

R. v. Find

Karl Find, appellant;
v.
Her Majesty The Queen, respondent, and
The Attorney General for Alberta and the Criminal Lawyers' Association (Ontario), interveners.

[2001] 1 S.C.R. 863

[2001] S.C.J. No. 34

2001 SCC 32

File No.: 27495.

Supreme Court of Canada

2000: October 13 / 2001: May 24.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (110 paras.)

Criminal law -- Jurors -- Right to challenge for cause -- Nature of offence -- Whether charges of sexual assault against children raise realistic possibility of juror partiality entitling accused to challenge for cause -- Criminal Code, R.S.C. 1985, c. C-46, s. 638(1)(b).

The accused was charged with 21 counts of sexual offences involving complainants ranging between 6 and 12 years of age at the time of the alleged offences. Prior to jury selection, he applied to challenge potential jurors for cause, arguing that the nature of the charges against him gave rise to a realistic possibility that some jurors might be unable to try the case against him impartially and solely on the evidence before them. The trial judge rejected the application. The accused was tried and convicted on 17 of the 21 counts. The majority of the Court of Appeal dismissed the accused's appeal, upholding the trial judge's ruling not to permit the accused to challenge prospective jurors for cause.

Held: The appeal should be dismissed. The nature of the charges against the accused did not give rise to the [page864] right to challenge prospective jurors for cause on the ground of partiality.

Section 638(1)(b) of the Criminal Code permits a party to challenge for cause where a prospective juror is not indifferent between the Crown and accused. Lack of indifference constitutes partiality. Establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision. The first branch of the test is concerned with the existence of a material bias, while the second is concerned with the potential effect of the bias on the trial process. However, the overarching consideration, in all cases, is whether there exists a realistic potential for partial juror behaviour. The first branch involves two concepts: "bias" and "widespread". "Bias" in the context of challenges for cause refers to an attitude that could lead jurors to decide the case in a prejudicial and unfair manner. Prejudice capable of unfairly affecting the outcome of the case is required. Bias is not determined at large but in the context of the specific case and may flow from a number of different attitudes. The second concept, "widespread", relates to the prevalence or incidence of the bias in question. The bias must be sufficiently pervasive in the community to raise the possibility that it may be harboured by members of a jury pool. If widespread bias is shown, the second branch of the test requires an accused to show that some jurors may not be able to set aside their bias despite the cleansing effect of the trial judge's instructions and the trial process itself. Ultimately, the decision to allow or deny an application to challenge for cause falls to the discretion of the trial judge. Where a realistic potential for partiality is shown to exist, the right to challenge must follow. If in doubt, the judge should err on the side of permitting challenges. Since jurors are presumed to be impartial, in order to rebut the presumption of impartiality, a party must call evidence or ask the trial judge to take judicial notice of facts, or both. In addition, the judge may draw inferences from events that occur in the proceedings and may make common sense inferences about how certain biases, if proved, may affect the decision-making process. The accused did not call any evidence in support of his application but relied heavily on proof by judicial notice. The threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by [page865] resort to readily accessible sources of indisputable accuracy.

Here, the material presented by the accused falls short of grounding judicial notice of widespread bias in Canadian society against an accused in sexual assault trials. First, while the widespread nature of abuse and its potentially traumatic impact are not disputed, widespread victimization, standing alone, fails to establish widespread bias that might lead jurors to discharge their task in a prejudicial and unfair manner. Second, strong views about a serious offence do not ordinarily indicate bias and nothing in the material supports the contention, nor is it self-evident, that an exception arises in the case of sexual assaults on children. Third, there was also no proof that widespread myths and stereotypes undermine juror impartiality. While stereotypical beliefs might incline some jurors against an accused, it is not notorious or indisputable that they enjoy widespread acceptance in Canadian society. Fourth, although crimes arouse deep and strong emotions, one cannot automatically equate strong emotions with an unfair and prejudicial bias against the accused. Jurors are not expected to be indifferent toward crimes. Strong emotions are common to the trial of many serious offences and have never grounded a right to challenge for cause. The proposition that sexual offences are generically different from other crimes in their tendency to arouse strong passions is debatable, and does not, therefore, lend itself to judicial notice. Fifth, the survey of past challenge

for cause cases involving sexual offences does not, without more, establish widespread bias arising from sexual assault charges. The number of prospective jurors disqualified, although relied on as support for judicial notice of widespread bias, is equally consistent with the conclusion that the challenge processes disqualified prospective jurors for acknowledging the intense emotions, beliefs, experiences and misgivings anyone might experience when confronted with the prospect of sitting as a juror [page866] on a case involving charges of sexual offences against children. Lastly, the theory of "generic prejudice" against accused persons in sexual assault trials has not been proved, nor could judicial notice be taken of the proposition that such prejudice exists. While judicial notice could be taken of the fact that sexual crimes are almost universally abhorred, this does not establish widespread bias arising from sexual assault trials.

Although the accused failed to satisfy the first branch of the test for partiality, it is prudent to consider the second branch, as the two parts are not watertight compartments. It is open to a trial judge reasonably to infer, in the absence of direct evidence, that some strains of bias by their very nature may prove difficult for jurors to identify and eliminate from their reasoning. The strength of the inference varies with the nature of the bias in issue, and its amenability to judicial cleansing. Fundamental distinctions exist between racial bias and the more general bias relating to the nature of the offence itself. Firstly, racial bias may impact more directly on a jury's decision than bias stemming from the nature of the offence because it is directed against a particular class of accused by virtue of an identifiable immutable characteristic. Secondly, trial safeguards may be less successful in cleansing racial prejudice because of its subtle, systemic and often unconscious operation. Bias directed toward the nature of the offence, however, is more susceptible to cleansing by the rigours of the trial process because it is more likely to be overt and acknowledged. The trial judge is more likely to address these concerns in the course of directions to the jury. Moreover, many of the safeguards the law has developed may be seen as a response to this type of bias. In the absence of evidence that strongly held beliefs or attitudes may affect jury behaviour in an unfair manner, it is difficult to conclude that they could not be cleansed by the trial process. It is speculative to assume that [page867] jurors will act on their beliefs to the detriment of an accused, in violation of their oath or affirmation, the presumption of innocence and the directions of the trial judge. As well, absent evidence to the contrary, there is no reason to believe that stereotypical attitudes about accused persons charged with a crime of a sexual nature are more elusive of the cleansing measures than stereotypical attitudes about complainants. It follows that such myths and stereotypes, even if widespread, provide little support for any inference of a behavioural link between these beliefs and the potential for juror partiality. Finally, absent evidence, it is highly speculative to suggest that the emotions surrounding sexual crimes will lead to prejudicial and unfair juror behaviour. The safeguards of the trial process and the instructions of the trial judge are designed to replace emotional reactions with rational, dispassionate assessment. Our long experience in the context of the trial of other serious offences suggests that our faith in this cleansing process is not misplaced. The accused failed to establish that sexual offences give rise to a strain of bias that is uniquely capable of eluding the cleansing effect of trial safeguards.

Cases Cited

Applied: R. v. Williams, [1998] 1 S.C.R. 1128; R. v. Parks (1993), 84 C.C.C. (3d) 353; R. v. Sherratt, [1991] 1 S.C.R. 509; R. v. Betker (1997), 115 C.C.C. (3d) 421; referred to: R. v. K. (A.) (1999), 45 O.R. (3d) 641; R. v. Barrow, [1987] 2 S.C.R. 694; R. v. G. (R.M.), [1996] 3 S.C.R. 362; R. v. O'Connor, [1995] 4 S.C.R. 411; R. v. Carosella, [1997] 1 S.C.R. 80; R. v. Lyons, [1987] 2

S.C.R. 309; R. v. Harrer, [1995] 3 S.C.R. 562; M. (A.) v. Ryan, [1997] 1 S.C.R. 157; R. v. Leipert, [1997] 1 S.C.R. 281; R. v. Hubbert (1975), 29 C.C.C. (2d) 279; R. v. L. (R.) (1996), 3 C.R. (5th) 70; R. v. Mattingly (1994), 28 C.R. (4th) 262; R. v. Potts (1982), 66 C.C.C. (2d) 219; R. v. Alli (1996), 110 C.C.C. (3d) 283; R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. Lavallée, [1990] 1 S.C.R. 852; R. v. Hillis, [1996] O.J. No. 2739 (QL); R. v. Osolin, [1993] 4 S.C.R. 595; R. v. Ewanchuk, [page868] [1999] 1 S.C.R. 330; R. v. W. (R.), [1992] 2 S.C.R. 122; R. v. D.D., [2000] 2 S.C.R. 275, 2000 SCC 43.

Statutes and Regulations Cited

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Tanovich, David M., David M. Paciocco, and Steven Skurka. Jury Selection in Criminal Trials: Skills, Science, and the Law. Concord, Ontario: Irwin Law, 1997.
Vidmar, Neil. "Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials" (1997), 21 Law & Hum. Behav. 5.
Wiener, Richard L., Audrey T. Feldman Wiener, and Thomas Grisso. "Empathy and Biased Assimilation of Testimonies in Cases of Alleged Rape" (1989), 13 Law & Hum. Behav. 343.

APPEAL from a judgment of the Ontario Court of Appeal (1999), 126 O.A.C. 261, [1999] O.J. No. 3295 (QL), dismissing the accused's appeal from his conviction on 17 counts relating to sexual offences. Appeal dismissed.

[page869]

David M. Tanovich and Umberto Sapone, for the appellant.
Jamie Klukach and Jennifer Woollcombe, for the respondent.
David M. Paciocco, for the intervener, the Criminal Lawyers' Association (Ontario).
Written submission by Jack Watson, Q.C., for the intervener, the Attorney General for Alberta.

Solicitors for the appellant: Pinkofsky Lockyer, Toronto; Sapone & Cautillo, Toronto.
Solicitor for the respondent: The Ministry of the Attorney General, Toronto.
Solicitors for the intervener, the Criminal Lawyers' Association (Ontario): Edelson & Associates, Ottawa.
Solicitor for the intervener, the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

The judgment of the Court was delivered by

McLACHLIN C.J.:--

I - Introduction

1 Trial by jury is a cornerstone of Canadian criminal law. It offers the citizen the right to be tried by an impartial panel of peers and imposes on those peers the task of judging fairly and impartially. Since our country's earliest days, Canadian jurors have met this challenge. Every year in scores of cases, jurors, instructed that they must be impartial between the prosecution and the accused, render fair and carefully deliberated verdicts. Yet some cases may give rise to real fears that, despite the safeguards of the trial process and the directions of the trial judge, some jurors may not be able to set aside personal views and function impartially.

2 The criminal law has developed procedures to address this possibility. One of the most important is the right of the accused to challenge a potential juror "for cause" where legitimate concerns arise. This Court recently held that widespread prejudice against the accused's racial group may permit an accused to challenge for cause: R. v. Williams, [1998] 1 S.C.R. 1128. In this appeal we are asked to find that charges of sexual assault of children similarly evoke widespread prejudice in the community [page870] and also entitle the accused to challenge prospective jurors for cause.

3 At stake are two important values. The first is the right to a fair trial by an impartial jury under s. 11(d) of the Canadian Charter of Rights and Freedoms. The second is the need to maintain an efficient trial process, unencumbered by needless procedural hurdles. Our task is to set out guidelines that ensure a fundamentally fair trial without unnecessarily complicating and lengthening trials and increasing the already heavy burdens placed on jurors.

4 The appellant was charged with sexual assault of children. Before the jury was empanelled, he applied to challenge the potential jurors for cause. The nature of the charges against him, he contended, gave rise to a realistic possibility that some prospective jurors might harbour such prejudice that they would be unable to act impartially and try the case solely on the evidence before them. The trial judge rejected this request, as did the majority of the Ontario Court of Appeal. Before this Court, the appellant reasserts his claim that the denial of the right to challenge for cause violated s. 638(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46, and deprived him of his Charter right to a fair trial.

5 I conclude that the appellant has not established the right to challenge for cause. No basis has been shown to support the conclusion that charges of sexual assault against children raise a realistic possibility of juror partiality entitling the accused to challenge for cause. Accordingly, the appeal must be dismissed.

II - History of the Case

6 The appellant was tried on 21 counts of sexual assault involving three complainants, who ranged [page871] between the ages of 6 and 12 at the time of the alleged offences. Prior to jury selection, defence counsel applied to challenge potential jurors for cause. No evidence was led in support of this application; rather, defence counsel contended a realistic potential for juror partiality arose from the ages of the alleged victims, the high number of alleged assaults, and the alleged use of violence. Defence counsel proposed that the following questions be put to potential jurors:

> Do you have strong feelings about the issue of rape and violence on young children?
>
> If so, what are those feelings based on?
>
> Would those strong feelings concerning the rape and violence on young children prevent you from giving Mr. Find a fair trial based solely on the evidence given during the trial of this case?

The trial judge, in a brief oral ruling, dismissed the application on the basis that it simply "doesn't fall anywhere near the dicta of the Court of Appeal in Regina v. Parks" (in R. v. Parks (1993), 84 C.C.C. (3d) 353, the Ontario Court of Appeal held that the accused was entitled to challenge potential jurors for cause on the basis of racial prejudice).

7 Later, during the process of empanelling the jury, a potential juror spontaneously offered that he had two children, stating "I just don't think I could separate myself from my feelings towards them and separate the case". This prospective juror was peremptorily challenged, and defence counsel renewed the request to challenge for cause, to no avail. The appellant was tried and convicted on 17 of the 21 counts.

8 The appellant appealed on the ground, inter alia, that the trial judge erred in not allowing challenges for cause. The spontaneous admission of the potential juror during the selection process was the only evidence relied upon before the Ontario Court of Appeal. The majority, per McMurtry C.J.O., held [page872] that this admission did not demonstrate a realistic potential for partiality and offered no evidentiary basis for allowing challenges for cause: (1999), 126 O.A.C. 261, at para. 8. Since no other evidence was led, the appellant could succeed only if the court could take judicial notice of a widespread bias in the community in relation to sexual offences of this kind. The majority held that judicial notice could not be taken of that fact, for the reasons articulated in R. v. K. (A.) (1999), 45 O.R. (3d) 641, a judgment released concurrently. Moldaver J.A. dissented on the challenge for cause issue, also relying on his reasons from K. (A.). Since both opinions import the substance of their reasons from the companion case of K. (A.), it is necessary to consider this case in some detail.

9 K. (A.) involved two brothers charged with the sexual assault of children aged 4 to 12 years at the time of the alleged assaults. The majority of the Court of Appeal, per Charron J.A., upheld the trial judge's decision to deny challenges for cause, while allowing the appeal on other grounds. Charron J.A. emphasized the distinction between racial prejudice and prejudice against persons charged with sexual assault, arguing that the first goes to a want of indifference towards the accused while the second relates to a want of indifference towards the nature of the crime. The connection between racial prejudice and a particular accused is direct and logical, whereas "strong attitudes

about a particular crime, even when accompanied by intense feelings of hostility and resentment towards those who commit the crime, will rarely, if ever, translate into partiality in respect of the accused" (para. 41). She rejected the argument that this Court's decision in Williams, supra, expanded the right to challenge for cause. While Williams recognized the possibility of bias arising from the nature of an offence, it did not eliminate the need to show a realistic potential for partiality, which remains [page873] the governing test for challenges for cause. This test was not met in the case before the court.

10 Charron J.A. found little support for the accused's application in statistics indicating widespread sexual abuse in Canadian society. These statistics, she observed, only demonstrate the prevalence of abuse; they do not indicate a resultant bias, let alone the nature of that bias or its impact on jury deliberation. To her mind, they did not support the inference that there exists a realistic risk of juror partiality. As to the appellant's contention that widespread attitudes about sexual offences may cause jurors to act contrary to their oath, Charron J.A. concluded that the material before the court did not describe the alleged attitudes, or indicate how they would affect juror behaviour. She noted that the work of Professor Neil Vidmar, often advanced in support of the concept of generic prejudice, is the subject of heated debate and suffers from a number of flaws, most notably a lack of attention to the impact of juror attitudes on deliberation behaviour.

11 Charron J.A. also found that the presence of "strong feelings, opinions and beliefs" is not so notorious as to be the subject of judicial notice - in fact, it was unclear exactly what beliefs and opinions were being targeted for judicial notice. Beliefs and opinions regarding allegations of sexual abuse are all over the map: some believe children never lie about abuse, others believe that children are especially susceptible to the influence of adults, and that their testimony should not be relied [page874] upon; some believe the trial system to be stacked in favour of the accused, others the complainant. Even if these opinions and beliefs are accepted as widespread, they are likely to be diffused in deliberation. The existence of feelings, opinions and beliefs about the crime of sexual assault does not translate into partiality - jurors are neither presumed, nor desired, to function as blank slates.

12 Finally, Charron J.A. remained unconvinced by evidence that a high proportion of prospective jurors were successfully challenged for cause in cases where challenges were allowed. She found it "impossible to draw any meaningful inference from the answers provided by the jurors when confronted with general questions such as those found ... in this case and in other cases relied upon" (K. (A.), supra, at para. 51). Many of the responses demonstrated nothing more than that the candidate would have difficulty hearing the case. No meaningful direction had been provided by the trial judge on the nature of jury duty or the meaning of impartiality, and no distinction drawn between partiality and the beliefs, emotions and opinions that influence all decision making.

13 Moldaver J.A., dissenting on this issue, was satisfied that a "realistic potential" of juror partiality arises from the nature of sexual assault charges, grounding a right in the accused to challenge prospective jurors for cause. Considering the evidence in its entirety, and taking judicial notice of what he found to be notorious facts, he made a number of preliminary findings: (1) sexual abuse impacts a large percentage of the population, supporting a reasonable inference that any jury panel may contain victims, perpetrators and people closely associated with them; (2) the effects of sexual abuse, or wrongful allegations, are potentially devastating and lifelong; (3) sexual assault tends to be committed [page875] along gender lines; (4) women and children have been subjected to systemic discrimination, including in the justice system - recent changes have gone too far for some,

but not far enough for others; (5) where challenges for cause have been permitted, literally hundreds of potential jurors have been found partial; and (6) unlike many crimes, a wide variety of stereotypes and beliefs surround the crime of sexual abuse.

14 Moldaver J.A. concluded that these factors, in combination, raised a realistic concern about juror partiality. At the very least, they left him in doubt, which should be resolved in favour of the accused: Williams, supra, at para. 22. While asserting that challenges for cause based on the nature of the offence are exceptional, he concluded that "unlike other crimes, by its nature, the crime of sexual abuse can give rise to intense and deep-seated biases that may be immune to judicial cleansing and highly prejudicial to an accused" (K. (A.), supra, at para. 189).

15 Two arguments held particular sway with Moldaver J.A. First, he accepted that the high incidence of juror disqualification where challenges for cause were allowed disclosed the existence of a widespread bias against persons charged with sexual assault. Second, he adopted Professor David Paciocco's theory that the prevalence of sexual assault and the politicization of this offence have created two groups of people, "dogmatists" and "victims", both of which contain people who may be unable to set aside their political convictions or experiences with abuse to render an impartial decision.

[page876]

III - Relevant Statutory and Constitutional Provisions

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

> 638. (1) A prosecutor or an accused is entitled to any number of challenges on the ground that
>
> ...
>
> (b) a juror is not indifferent between the Queen and the accused;
>
> ...
>
> (2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

Canadian Charter of Rights and Freedoms

> 11. Any person charged with an offence has the right
>
> ...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

IV - Issue

17 Did the nature of the charges against the accused give rise to the right to challenge jurors for cause on the ground of partiality?

V - Analysis

A. Overview of the Jury Selection Process

18 To provide context and guidance to the determination of this issue, it is necessary to consider the process of jury selection and the place of challenges for cause in that process.

19 The jury selection process falls into two stages. The first is the "pre-trial" process, whereby a panel (or "array") of prospective jurors is organized and made available at court sittings as a pool from which trial juries are selected. The second stage is the "in-court" process, involving the selection of a trial jury from this previously prepared panel. Provincial [page877] and federal jurisdictions divide neatly between these two stages: the first stage is governed by provincial legislation, while the second stage falls within the exclusive domain of federal law (see C. Granger, The Criminal Jury Trial in Canada (2nd ed. 1996), at pp. 83-84; R. v. Barrow, [1987] 2 S.C.R. 694, at pp. 712-13).

20 Both stages embody procedures designed to ensure jury impartiality. The "pre-trial" stage advances this objective by randomly assembling a jury pool of appropriate candidates from the greater community. This is assured by provincial legislation addressing qualifications for jury duty; compilation of the jury list; the summoning of panel members; selection of jurors from the jury list; and conditions for being excused from jury duty. These procedures furnish, so far as possible, a representative jury pool: R. v. Sherratt, [1991] 1 S.C.R. 509, at pp. 525-26; P. Schulman and E. R. Myers, "Jury Selection", in Studies on the Jury (1979), a report to the Law Reform Commission of Canada at p. 408.

21 The "in-court" process is governed by ss. 626 to 644 of the Criminal Code. Its procedures directly address juror impartiality. The selection of the jury from the assembled pool of potential jurors occurs in an open courtroom, with the accused present. The jury panel is brought into the courtroom and the trial judge makes a few opening remarks to the panel. Provided the validity of the jury panel itself is not challenged (pursuant to the grounds listed in s. 629(1)), the Registrar reads the indictment, the accused enters a plea, and the empanelling of the jury immediately begins: see Sherratt, supra, at pp. 519-22.

22 Members of the jury pool may be excluded from the jury in two ways during the empanelling process. First, the trial judge enjoys a limited preliminary power to excuse prospective jurors. This is referred to as "judicial pre-screening" of the jury array. At common law, the trial judge was empowered [page878] to ask general questions of the panel to uncover manifest bias or personal hardship, and to excuse a prospective juror on either ground. Today in Canada, the judge typically raises these issues in his remarks to the panel, at which point those in the pool who may have difficulties are invited to identify themselves. If satisfied that a member of the jury pool should not serve either for reasons of manifest bias or hardship, the trial judge may excuse that person from jury service.

23 Judicial pre-screening at common law developed as a summary procedure for expediting jury selection where the prospective juror's partiality was uncontroversial, such as where he or she had an interest in the proceedings or was a relative of a witness or the accused: Barrow, supra, at p. 709. The consent of both parties to the judicial pre-screening was presumed, provided the reason for

discharge was "manifest" or obvious. Otherwise, the challenge for cause procedure applied: Sherratt, supra, at p. 534. In 1992, s. 632 of the Criminal Code was enacted to address judicial pre-screening of the jury panel. This provision allows the judge, at any time before the trial commences, to excuse a prospective juror for personal interest, relationship with the judge, counsel, accused or prospective witnesses, or personal hardship or other reasonable cause.

24 The second way members of the jury may be excluded during the empanelling process is upon a challenge of the prospective juror by the Crown or the accused. Both parties are entitled to challenge potential members of the jury as these prospective jurors are called to "the book". Two types of challenge are available to both the Crown and the accused: (1) a limited number of peremptory challenges without providing reasons pursuant to s. 634; and (2) an unlimited number of challenges for cause, with leave of the judge, on one of the grounds enumerated under s. 638(1) of the Criminal Code.

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25 One ground for challenge for cause is that a prospective juror is "not indifferent between the Queen and the accused": Criminal Code, s. 638(1)(b). If the judge is satisfied that a realistic potential for juror partiality exists, he or she may permit the requested challenges for cause. If challenged for cause, the impartiality of the candidate is tried by two triers of fact, usually two previously sworn jurors: Criminal Code, s. 640(2). Absent elimination, the juror is sworn and takes his or her place in the jury box. After the full complement of 12 jurors is empanelled, the accused is placed in their charge, and the trial commences.

26 The Canadian system of selecting jurors may be contrasted with procedures prevalent in the United States. In both countries the aim is to select a jury that will decide the case impartially. The Canadian system, however, starts from the presumption that jurors are capable of setting aside their views and prejudices and acting impartially between the prosecution and the accused upon proper instruction by the trial judge on their duties. This presumption is displaced only where potential bias is either clear and obvious (addressed by judicial pre-screening), or where the accused or prosecution shows reason to suspect that members of the jury array may possess biases that cannot be set aside (addressed by the challenge for cause process). The American system, by contrast, treats all members of the jury pool as presumptively suspect, and hence includes a preliminary voir dire process, whereby prospective jurors are frequently subjected to extensive questioning, often of a highly personal nature, to guide the respective parties in exercising their peremptory challenges and challenges for cause.

27 The respective benefits and costs of the different approaches may be debated. With respect to benefits, it is unclear that the American system produces better juries than the Canadian system. As Cory J. observed in R. v. G. (R.M.), [1996] 3 S.C.R. 362, at para. 13, we possess "a centuries-old tradition of juries reaching fair and courageous [page880] verdicts". With respect to costs, jury selection under the American system takes longer and intrudes more markedly into the privacy of prospective jurors. It has also been suggested that the extensive questioning permitted by this process, while aimed at providing an impartial jury, is open to abuse by counsel seeking to secure a favourable jury, or to indoctrinate jurors to their views of the case (see Schulman and Myers, supra, at p. 429).

28 The ultimate requirement of a system of jury selection is that it results in a fair trial. A fair trial, however, should not be confused with a perfect trial, or the most advantageous trial possible from the accused's perspective. As I stated in R. v. O'Connor, [1995] 4 S.C.R. 411, at para. 193, "[w]hat constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process... . What the law demands is not perfect justice, but fundamentally fair justice". See also R. v. Carosella, [1997] 1 S.C.R. 80, at para. 72; R. v. Lyons, [1987] 2 S.C.R. 309, at p. 362; R. v. Harrer, [1995] 3 S.C.R. 562, at para. 14. At the same time, occasional injustice cannot be accepted as the price of efficiency: M. (A.) v. Ryan, [1997] 1 S.C.R. 157, at para. 32; R. v. Leipert, [1997] 1 S.C.R. 281.

29 These are the considerations that must guide us in assessing whether the appellant in this case has established the right to challenge for cause. Challenges for cause that will serve no purpose but to increase delays and intrude on prospective jurors' privacy are to be avoided. As the Ontario Court of Appeal cautioned in R. v. Hubbert (1975), 29 C.C.C. (2d) 279, at p. 291: "[t]rials should not be unnecessarily prolonged by speculative and sometimes suspect challenges for cause". However, if there exists reason to believe that the jury pool may be so tainted by incorrigible prejudices that [page881] the trial may not be fair, then challenges for cause must be allowed.

B. The Test: When Should Challenges for Cause Be Granted Under Section 638(1)(b)?

1. The Test for Partiality

30 Section 638(1)(b) of the Code permits a party to challenge for cause on the ground that "a juror is not indifferent between the Queen and the accused". Lack of indifference may be translated as "partiality". Both terms describe a predisposed state of mind inclining a juror prejudicially and unfairly toward a certain party or conclusion: see Williams, supra, at para. 9.

31 In order to challenge for cause under s. 638(1)(b), one must show a "realistic potential" that the jury pool may contain people who are not impartial, in the sense that even upon proper instructions by the trial judge they may not be able to set aside their prejudice and decide fairly between the Crown and the accused: Sherratt, supra; Williams, supra, at para. 14.

32 As a practical matter, establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision. These two components of the challenge for cause test reflect, respectively, the attitudinal and behavioural components of partiality: Parks, supra, at pp. 364-65; R. v. Betker (1997), 115 C.C.C. (3d) 421 (Ont. C.A.), at pp. 435-36.

33 These two components of the test involve distinct inquiries. The first is concerned with the existence of a material bias, and the second with the [page882] potential effect of the bias on the trial process. However, the overarching consideration, in all cases, is whether there exists a realistic potential for partial juror behaviour. The two components of this test serve to ensure that all aspects of the issue are examined. They are not watertight compartments, but rather guidelines for determining whether, on the record before the court, a realistic possibility exists that some jurors may decide the case on the basis of preconceived attitudes or beliefs, rather than the evidence placed before them.

34 The test for partiality involves two key concepts: "bias" and "widespread". It is important to understand how each term is used.

35 The New Oxford Dictionary of English (1998), at p. 169, defines "bias" as "prejudice in favour of or against one thing, person, or group compared with another, especially in a way considered to be unfair". "Bias", in the context of challenges for cause, refers to an attitude that could lead jurors to discharge their function in the case at hand in a prejudicial and unfair manner.

36 It is evident from the definition of bias that not every emotional or stereotypical attitude constitutes bias. Prejudice capable of unfairly affecting the outcome of the case is required. Bias is not determined at large, but in the context of the specific case. What must be shown is a bias that could, as a matter of logic and experience, incline a juror to a certain party or conclusion in a manner that is unfair. This is determined without regard to the cleansing effect of trial safeguards and the direction of the trial judge, which become relevant only at the second stage consideration of the behavioural effect of the bias.

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37 Courts have recognized that "bias" may flow from a number of different attitudes, including: a personal interest in the matter to be tried (Hubbert, supra, at p. 295; Criminal Code, s. 632); prejudice arising from prior exposure to the case, as in the case of pre-trial publicity (Sherratt, supra, at p. 536); and prejudice against members of the accused's social or racial group (Williams, supra, at para. 14).

38 In addition, some have suggested that bias may result from the nature and circumstances of the offence with which the accused is charged: R. v. L. (R.) (1996), 3 C.R. (5th) 70 (Ont. Ct. (Gen. Div.)); R. v. Mattingly (1994), 28 C.R. (4th) 262 (Ont. Ct. (Gen. Div.)); N. Vidmar, "Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials" (1997), 21 Law & Hum. Behav. 5. In Williams, supra, at para. 10, this Court referred to Vidmar's suggestion that bias might, in some cases, flow from the nature of the offence. However, the Court has not, prior to this case, directly considered this kind of bias.

39 The second concept, "widespread", relates to the prevalence or incidence of the bias in question. Generally speaking, the alleged bias must be established as sufficiently pervasive in the community to raise the possibility that it may be harboured by one or more members of a representative jury pool (although, in exceptional circumstances, a less prevalent bias may suffice, provided it raises a realistic potential of juror partiality: Williams, supra, at para. 43). If only a few individuals in the community hold the alleged bias, the chances of this bias tainting the jury process are negligible. For this reason, a court must generally be satisfied that the alleged bias is widespread in the community before a right to challenge for cause may flow.

40 If widespread bias is shown, a second question arises: may some jurors be unable to set aside their bias despite the cleansing effect of the judge's instructions and the trial process? This is the [page884] behavioural component of the test. The law accepts that jurors may enter the trial with biases. But the law presumes that jurors' views and biases will be cleansed by the trial process. It therefore does not permit a party to challenge their right to sit on the jury because of the existence of widespread bias alone.

41 Trial procedure has evolved over the centuries to counter biases. The jurors swear to discharge their functions impartially. The opening addresses of the judge and the lawyers impress upon jurors the gravity of their task, and enjoin them to be objective. The rules of process and evidence underline the fact that the verdict depends not on this or that person's views, but on the evidence and the law. At the end of the day, the jurors are objectively instructed on the facts and the law by the judge, and sent out to deliberate in accordance with those instructions. They are asked not to decide on the basis of their personal, individual views of the evidence and law, but to listen to each other's views and evaluate their own inclinations in light of those views and the trial judge's instructions. Finally, they are told that they must not convict unless they are satisfied of the accused's guilt beyond a reasonable doubt and that they must be unanimous.

42 It is difficult to conceive stronger antidotes than these to emotion, preconception and prejudice. It is against the backdrop of these safeguards that the law presumes that the trial process will cleanse the biases jurors may bring with them, and allows challenges for cause only where a realistic potential exists that some jurors may not be able to function impartially, despite the rigours of the trial process.

43 It follows from what has been said that "impartiality" is not the same as neutrality. Impartiality does not require that the juror's mind be a blank [page885] slate. Nor does it require jurors to jettison all opinions, beliefs, knowledge and other accumulations of life experience as they step into the jury box. Jurors are human beings, whose life experiences inform their deliberations. Diversity is essential to the jury's functions as collective decision-maker and representative conscience of the community: Sherratt, supra, at pp. 523-24. As Doherty J.A. observed in Parks, supra, at p. 364, "[a] diversity of views and outlooks is part of the genius of the jury system and makes jury verdicts a reflection of the shared values of the community".

44 To treat bias as permitting challenges for cause, in the absence of a link with partial juror behaviour, would exact a heavy price. It would erode the threshold for entitlement defined in Sherratt and Williams, and jeopardize the representativeness of the jury, excluding from jury service people who could bring valuable experience and insight to the process. Canadian law holds that "finding out what kind of juror the person called is likely to be - his personality, beliefs, prejudices, likes or dislikes" is not the purpose of challenges for cause: Hubbert, supra, at p. 289. The aim is not favourable jurors, but impartial jurors.

45 Ultimately, the decision to allow or deny an application to challenge for cause falls to the discretion of the trial judge. However, judicial discretion should not be confused with judicial whim. Where a realistic potential for partiality exists, the right to challenge must flow: Williams, supra, at para. 14. If in doubt, the judge should err on the side of permitting challenges. Since the right of the accused to a fair trial is at stake, "[i]t is better to risk allowing what are in fact unnecessary challenges, [page886] than to risk prohibiting challenges which are necessary": Williams, supra, at para. 22.

2. Proof: How a Realistic Potential for Partiality May Be Established

46 A party may displace the presumption of juror impartiality by calling evidence, by asking the judge to take judicial notice of facts, or both. In addition, the judge may draw inferences from events that occur in the proceedings and may make common sense inferences about how certain biases, if proved, may affect the decision-making process.

47 The first branch of the inquiry - establishing relevant widespread bias- requires evidence, judicial notice or trial events demonstrating a pervasive bias in the community. The second stage of the inquiry - establishing a behavioural link between widespread attitudes and juror conduct - may be a matter of proof, judicial notice, or simply reasonable inference as to how bias might influence the decision-making process: Williams, supra, at para. 23.

48 In this case, the appellant relies heavily on proof by judicial notice. Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: R. v. Potts (1982), 66 C.C.C. (2d) 219 (Ont. C.A.); [page887] J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at p. 1055.

49 The scientific and statistical nature of much of the information relied upon by the appellant further complicates this case. Expert evidence is by definition neither notorious nor capable of immediate and accurate demonstration. This is why it must be proved through an expert whose qualifications are accepted by the court and who is available for cross-examination. As Doherty J.A. stated in R. v. Alli (1996), 110 C.C.C. (3d) 283 (Ont. C.A.), at p. 285: "[a]ppellate analysis of untested social science data should not be regarded as the accepted means by which the scope of challenges for cause based on generic prejudice will be settled".

C. Were the Grounds for Challenge for Cause Present in this Case?

50 To challenge prospective jurors for cause, the appellant must displace the presumption of juror impartiality by showing a realistic potential for partiality. To do this, the appellant must demonstrate the existence of a widespread bias arising from the nature of the charges against him (the "attitudinal" component), that raises a realistic potential for partial juror behaviour despite the safeguards of the trial process (the "behavioural" component). I will discuss each of these requirements in turn as they apply to this case.

1. Widespread Bias

51 In this case, the appellant alleges that the nature and the circumstances of the offence with which he is charged give rise to a bias that could unfairly incline jurors against him or toward his conviction. [page888] He further alleges that this bias is widespread in the community. In support of this submission, the appellant relies on the following propositions from Moldaver J.A.'s dissent in K. (A.), supra, at para. 166. The parties generally agree on these facts, but dispute the conclusions to be drawn from them:

- Studies and surveys conducted in Canada over the past two decades reveal that a large percentage of the population, both male and female, have been the victims of sexual abuse. From this, it is reasonable to infer that any given jury panel may contain victims of sexual abuse, perpetrators and people closely associated with them.

- The harmful effects of sexual abuse can prove devastating not only to those who have been victimized, but those closely related to them. Tragically, many victims remain traumatized and psychologically scarred for life. By the same token, for those few individuals who have been wrongfully accused of sexual abuse, the effects can also be devastating.
- Sexual assault tends to be committed along gender lines. As a rule, it is women and children who are victimized by men.
- Women and children have been subjected to systemic discrimination reflected in both individual and institutional conduct, including the criminal justice system. As a result of widespread media coverage and the earnest and effective efforts of lobby groups in the past decade, significant and long overdue changes have come about in the criminal justice system. For some, the changes have not gone far enough; for others, too far.
- Where challenges for cause have been permitted in cases involving allegations of sexual abuse, literally hundreds of prospective jurors have been found to be partial by the triers of fact. In those cases where trial judges have refused to permit the challenge, choosing instead to vet the panel at large for bias, the numbers are equally substantial.

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- Unlike many crimes, there are a wide variety of stereotypical attitudes and beliefs surrounding the crime of sexual abuse.

52 While the parties agree on these basic facts, they disagree on whether they demonstrate widespread bias. The appellant called no evidence, expert or otherwise, on the incidence or likely effect of prejudice stemming from the nature of the offences with which he is charged. Instead, he asks the Court to take judicial notice of a widespread bias arising from allegations of the sexual assault of children. The Crown, by contrast, argues that the facts on which it agrees do not translate into bias, much less widespread bias.

53 The appellant relies on the following: (a) the incidence of victimization and its effect on members of the jury pool; (b) the strong views held by many about sexual assault and the treatment of this crime by the criminal justice system; (c) myths and stereotypes arising from widespread and deeply entrenched attitudes about sexual assault; (d) the incidence of intense emotional reactions to sexual assault, such as a strong aversion to the crime or undue empathy for its victims; (e) the experience of Ontario trial courts, where hundreds of potential jurors in such cases have been successfully challenged as partial; and (f) social science research indicating a "generic prejudice" against the accused in sexual assault cases. He argues that these factors permit the Court to take judicial notice of widespread bias arising from charges of sexual assault of children.

54 It is worth reminding ourselves that at this stage we are concerned solely with the nature and prevalence of the alleged biases (i.e., the "attitudinal" component), and not their amenability to cleansing [page890] by the trial process, which is the focus of the "behavioural" component.

(a) Incidence of Victimization

55 The appellant argues that the prevalence and potentially devastating impact of sexual assault permit the Court to conclude that any given jury pool is likely to contain victims or those close to them who may harbour a prejudicial bias as a consequence of their experiences.

56 The Crown acknowledges both the widespread nature of abuse and its potentially traumatic impact. Neither of these facts is in issue. Nor is it unreasonable to conclude from these facts that victims of sexual assault, or those close to them, may turn up in a jury panel. What is disputed is whether this widespread victimization permits the Court to conclude, without proof, that the victims and those who share their experience are biased, in the sense that they may harbour prejudice against the accused or in favour of the Crown when trying sexual assault charges.

57 The only social science research before us on the issue of victim empathy is a study by R. L. Wiener, A. T. Feldman Wiener and T. Grisso, "Empathy and Biased Assimilation of Testimonies in Cases of Alleged Rape" (1989), 13 Law & Hum. Behav. 343. The appellant cites this study for the proposition that those participants acquainted in some way with a rape victim demonstrated a greater tendency, under the circumstances of the study, to find a defendant guilty. However, as the Crown notes, this study offers no evidence that victim status in itself impacts jury verdicts. In fact, the study found no correlation between degree of empathy for rape victims and tendency to convict, nor did it find higher degrees of victim empathy amongst those persons acquainted with rape victims. Further, the study was limited to a small sample of participants. It made no attempt to simulate an actual jury trial, and did not involve a deliberation [page891] process or an actual verdict. In the absence of expert testimony, tested under cross-examination, as to the conclusions properly supported by this study, I can only conclude that it provides little assistance in establishing the existence of widespread bias arising from the incidence of sexual assault in Canadian society.

58 Moldaver J.A. concluded that the prevalence of sexual assault in Canadian society and its traumatic and potentially lifelong effects, provided a realistic basis to believe that victims of this crime may harbor intense and deep-seated biases. In arriving at this conclusion, he expressly relied on an unpublished article by Professor David Paciocco, "Challenges for Cause in Jury Selection after Regina v. Parks: Practicalities and Limitations", Canadian Bar Association - Ontario, February 11, 1995, which he quoted at para. 176 for the proposition that "[o]ne cannot help but believe that these deep scars would, for some, prevent them from adjudicating sexual offence violations impartially".

59 This is, however, merely the statement of an assumption, offered without a supporting foundation of evidence or research. Courts must approach sweeping and untested "common sense" assumptions about the behaviour of abuse victims with caution: see R. v. Seaboyer, [1991] 2 S.C.R. 577 (per L'Heureux-Dubé J., dissenting in part); R. v. Lavallee, [1990] 1 S.C.R. 852, at pp. 870-72 (per Wilson J.). Certainly these assumptions are not established beyond reasonable dispute, or documented with indisputable accuracy, so as to permit the Court to take judicial notice of them.

60 I conclude that while widespread victimization may be a factor to be considered, standing alone it [page892] fails to establish widespread bias that might lead jurors to discharge their task in a prejudicial and unfair manner.

(b) Strongly Held Views Relating to Sexual Offences

61 The appellant submits that the politicized and gender-based nature of sexual offences gives rise to firmly held beliefs, opinions and attitudes that establish widespread bias in cases of sexual assault.

62 This argument found favour with Moldaver J.A. in K. (A.). Moldaver J.A. judicially noticed the tendency of sexual assault to be committed along gender lines. He also took judicial notice of the systemic discrimination women and children have faced in the criminal justice system, and the fact that recent reforms have gone too far for some and not far enough for others. From this foundation of facts, he inferred that the gender-based and politicized nature of sexual offences leads to a realistic possibility that some members of the jury pool, as a result of their political beliefs, will harbour deep-seated and virulent biases that might prove resistant to judicial cleansing. Quoting from the work of Professor Paciocco, Moldaver J.A. emphasized that strong political convictions and impartiality are not necessarily incongruous, but that for some "feminists" "commitment gives way to zealotry and dogma". The conviction that the justice system and its rules are incapable of protecting women and children, it is argued, may lead some potential jurors to disregard trial directions and rules safeguarding the presumption of innocence. Little regard for judicial direction can be expected from "those who see the prosecution of [page893] sexual offenders as a battlefront in a gender based war" (para. 177).

63 The appellant supports this reasoning, adding that the polarized, politically charged nature of sexual offences results in two prevalent social attitudes: first, that the criminal justice system is incapable of dealing with an "epidemic" of abuse because of its male bias or the excessive protections it affords the accused; and second, that conviction rates in sexual offence cases are unacceptably low. These beliefs, he alleges, may jeopardize the accused's right to a fair trial. For example, jurors harbouring excessive political zeal may ignore trial directions and legal rules perceived as obstructing the "truth" of what occurred, or may simply "cast their lot" with the victim. All this, the appellant submits, amounts to widespread bias in the community incompatible with juror impartiality.

64 The appellant does not deny that jurors trying any serious offence may hold strong views about the relevant law. Nor does he suggest such views raise concerns about bias in the trial of most offences. Few rules of criminal law attract universal support, and many engender heated debate. The treatment of virtually all serious crimes attracts sharply divided opinion, fervent criticism, and advocacy for reform. General disagreement or criticism of the relevant law, however, does not mean a prospective juror is inclined to take the law into his or her own hands at the expense of an individual accused.

65 The appellant's submission reduces to this: while strong views on the law do not ordinarily indicate bias, an exception arises in the case of [page894] sexual assaults on children. The difficulty, however, is that there is nothing in the material that supports this contention, nor is it self-evident. There is no indication that jurors are more willing to cross the line from opinion to prejudice in relation to sexual assault than for any other serious crime. It is therefore far from clear that strongly held views about sexual assault translate into bias, in the required sense of a tendency to act in an unfair and prejudicial manner.

66 Moreover, assuming that the strong views people may hold about sexual assault raise the possibility of bias, how widespread such views are in Canadian society remains a matter of conjecture. The material before the Court offers no measure of the prevalence in Canadian society of the specific attitudes identified by the appellant as corrosive of juror impartiality. Some people may indeed believe that the justice system is faltering in the face of an epidemic of abuse and that perpe-

trators of this crime too often escape conviction; yet, it is far from clear that these beliefs are prevalent in our society, let alone that they translate into bias on a widespread scale.

(c) Myths and Stereotypes About Sexual Offences

67 The appellant suggests that the strong views that surround the crime of sexual assault may contribute to widespread myths and stereotypes that undermine juror impartiality. In any given jury pool, he argues, some people may reason from the prevalence of abuse to the conclusion that the accused is likely guilty; some may assume children never lie about abuse; and some may reason that the accused is more likely to be guilty because he is a man.

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68 Again, however, the proof falls short. Although these stereotypical beliefs clearly amount to bias that might incline some people against the accused or toward conviction, it is neither notorious nor indisputable that they enjoy widespread acceptance in Canadian society. Myths and stereotypes do indeed pervade public perceptions of sexual assault. Some favour the accused, others the Crown. In the absence of evidence, however, it is difficult to conclude that these stereotypes translate into widespread bias.

(d) Emotional Nature of Sexual Assault Trials

69 The appellant asks the Court to take judicial notice of the emotional nature of sexual assault trials and to conclude that fear, empathy for the victim, and abhorrence of the crime establish widespread bias in the community. His concern is that jurors, faced with allegations of sexual assaults of children, may act on emotion rather than reason. This is particularly the case, he suggests, for past victims of abuse, for whom the moral repugnancy of the crime may be amplified. He emphasizes that the presumption of innocence in criminal trials demands the acquittal of the "probably" guilty. An intense aversion to sexual crimes, he argues, may incline some jurors to err on the side of conviction in such circumstances. Undue empathy for the victim, he adds, may also prompt a juror to "validate" the complaint with a guilty verdict, rather than determine guilt or innocence according to the law.

70 Crimes commonly arouse deep and strong emotions. They represent a fundamental breach of the perpetrator's compact with society. Crimes make victims, and jurors cannot help but sympathize [page896] with them. Yet these indisputable facts do not necessarily establish bias, in the sense of an attitude that could unfairly prejudice jurors against the accused or toward conviction. Many crimes routinely tried by jurors are abhorrent. Brutal murders, ruthless frauds and violent attacks are standard fare for jurors. Abhorred as they are, these crimes seldom provoke suggestions of bias incompatible with a fair verdict.

71 One cannot automatically equate strong emotions with an unfair and prejudicial bias against the accused. Jurors are not expected to be indifferent toward crimes. Nor are they expected to remain neutral toward those shown to have committed such offences. If this were the case, prospective jurors would be routinely and successfully challenged for cause as a preliminary stage in the trial of all serious criminal offences. Instead, we accept that jurors often abhor the crime alleged to

have been committed - indeed there would be cause for alarm if representatives of a community did not deplore heinous criminal acts. It would be equally alarming if jurors did not feel empathy or compassion for persons shown to be victims of such acts. These facts alone do not establish bias. There is simply no indication that these attitudes, commendable in themselves, unfairly prejudice jurors against the accused or toward conviction. They are common to the trial of many serious offences and have never grounded a right to challenge for cause.

72 Recognizing this fact, the appellant and the intervener Criminal Lawyers' Association ("CLA") contend that allegations of sexual offences against children incite emotional reactions of an intensity above and beyond those invoked by other criminal acts. Such offences, they contend, stand alone in their capacity to inflame jurors and cloud reason. Moldaver J.A., dissenting in K. (A.), distinguished sexual offences from most [page897] other despicable criminal acts, on the basis that "sexual assault trials tend to be emotionally charged, particularly in cases of child abuse, where the mere allegation can trigger feelings of hostility, resentment and disgust in the minds of jurors" (para. 188).

73 The proposition that sexual offences are generically different from other crimes in their ability to arouse strong passion is not beyond reasonable debate or capable of immediate and accurate demonstration. As such, it does not lend itself to judicial notice. Nor was evidence led on this issue. Some may well react to allegations of a sexual crime with emotions of the intensity described by the appellant. Yet how prevalent such emotions are in Canadian society remains a matter of conjecture. The Court simply cannot reach conclusions on these controversial matters in an evidentiary vacuum. As a result, the appellant has not established the existence of an identifiable bias arising from the emotionally charged nature of sexual crimes, or the prevalence of this bias should it in fact exist.

(e) The History of Challenges for Cause in Ontario

74 The appellant refers this Court to the experience of Ontario trial courts where judges have allowed defence counsel to challenge prospective jurors for cause in cases involving allegations of sexual assault: see Vidmar, supra, at p. 5; D. M. Tanovich, D. M. Paciocco, S. Skurka, Jury Selection in Criminal Trials: Skills, Science, and the Law (1997), at pp. 239-42. These sources, cataloguing 34 cases, indicate that hundreds of potential jurors have been successfully challenged for cause as not indifferent between the Crown and the accused. It is estimated that 36 percent of the prospective jurors challenged were disqualified.

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75 The appellant argues that the fact that hundreds of prospective jurors have been found to be partial is in itself sufficient evidence of widespread bias arising from sexual assault trials. This is proof, he asserts, that the social realities surrounding sexual assault trials give rise to prejudicial beliefs, attitudes and emotions on a widespread scale in Canadian communities.

76 The Crown disagrees. It argues first, that the survey lacks validity because of methodological defects, and second, that even if the results are accepted, the successful challenges do not demonstrate a widespread bias, but instead may be attributed to other causes.

77 The first argument against the survey is that its methodology is unsound. The Crown raises a number of concerns: the survey is entirely anecdotal, not comprehensive or random; not all of the questions asked of prospective jurors are indicated; there is no way in which to assess the directions, if any, provided by the trial judge, especially in relation to the distinction between strong opinions or emotions and partiality; and no comparative statistics are provided contrasting these results with the experience in other criminal law contexts. The intervener CLA concedes that the survey falls short of scientific validity, but contends that it nevertheless documents a phenomena of considerable significance. Hundreds of prospective jurors disqualified on the grounds of bias by impartial triers of fact must, it is argued, displace the presumption of juror impartiality. Nonetheless, the lack of methodological rigour and the absence of expert evidence undermine the suggestion that the Ontario experience establishes widespread bias.

78 The second argument against the survey is that the questions asked were so general, and the information elicited so scarce, that no meaningful inference [page899] can be drawn from the responses given by challenged jurors or from the number of potential jurors disqualified. Charron J.A., for the majority in K. (A.), observed that prospective jurors in that case received no meaningful instruction on the nature of jury duty or the meaning and importance of impartiality. Further, they often indicated confusion at the questions posed to them or asked that the questions be repeated. In the end, numerous prospective jurors were disqualified for offering little more than that they would find it difficult to hear a case of this nature, or that they held strong emotions about the sexual abuse of children.

79 The challenge for cause process rests to a considerable extent on self-assessment of impartiality by the challenged juror, and the response to questions on challenge often will be little more than an affirmation or denial of one's own ability to act impartially in the circumstances of the case. In the absence of guidance, prospective jurors may conflate disqualifying bias with a legitimate apprehension about sitting through a case involving allegations of sexual abuse of children, or the strong views or emotions they may hold on this subject.

80 Where potential jurors are challenged for racial bias, the risk of social disapprobation and stigma supports the veracity of admissions of potential partiality. No similar indicia of reliability attach to the frank and open admission of concern about one's ability to approach and decide a case of alleged child sexual abuse judiciously. While a prospective juror's admission of racial prejudice may suggest partiality, the same cannot be said of an admission of abhorrence or other emotional attitude toward the sexual abuse of children. We do not know whether the potential jurors who professed concerns about serving on juries for sexual assault charges were doing so because they were biased, or for other reasons. We do not know [page900] whether they were told that strong emotions and beliefs would not in themselves impair their duty of impartiality, or whether they were informed of the protections built into the trial process.

81 In fact, the number of prospective jurors disqualified, although relied on as support for judicial notice of widespread bias, is equally consistent with the conclusion that the challenge processes, despite the best intentions of the participants, disqualified prospective jurors for acknowledging the intense emotions, beliefs, experiences and misgivings anyone might experience when confronted with the prospect of sitting as a juror on a case involving charges of sexual assault of children. As discussed, the mere presence of strong emotions and opinions cannot be equated automatically with bias against the accused or toward conviction.

82 It follows that the survey of past challenge for cause cases involving charges of sexual assault does not without more establish widespread bias arising from these charges.

(f) Social Science Evidence of "Generic Prejudice"

83 The appellant argues that social science research, particularly that of Vidmar, supports the contention that social realities, such as the prevalence of sexual abuse and its politically charged nature, translate into a widespread bias in Canadian society.

84 In Williams, supra, the Court referred to Vidmar's research in concluding that the partiality targeted by s. 638(1)(b) was not limited to biases [page901] arising from a direct interest in the proceeding or pre-trial exposure to the case, but could arise from any of a variety of sources, including the "nature of the crime itself" (para. 10). However, recognition that the nature of an offence may give rise to "generic prejudice" does not obviate the need for proof. Labels do not govern the availability of challenges for cause. Regardless of how a case is classified, the ultimate issue is whether a realistic possibility exists that some potential jurors may try the case on the basis of prejudicial attitudes and beliefs, rather than the evidence offered at trial. The appellant relies on the work of Vidmar for the proposition that such a possibility does in fact arise from allegations of sexual assault.

85 Vidmar is known for the theory of a "generic prejudice" against accused persons in sexual assault trials and for the conclusion that the attitudes and beliefs of jurors are frequently reflected in the verdicts of juries on such trials. However, the conclusions of Vidmar do not assist in finding widespread bias. His theory that a "generic prejudice" exists against those charged with sexual assault, although in the nature of expert evidence, has not been proved. Nor can the Court take judicial notice of this contested proposition. With regard to the behaviour of potential jurors, the Court has no foundation in this case to draw an inference of partial juror conduct, as discussed in more detail below, under the behavioural stage of the partiality test.

86 Vidmar himself acknowledges the limitations of his research. He concedes that the notion of "generic prejudice" lacks scientific validity, and that none of the studies he relies on actually asked the questions typically asked of Canadian jurors, including whether they can impartially adjudicate guilt or innocence in a sexual assault trial: Vidmar, supra. Moreover, the authorities Vidmar relies on are almost exclusively "confined to examination of [page902] public attitudes towards certain criminal acts, especially child sexual abuse. Not surprisingly, it appears the public is quite disapproving of persons who have sexually abused children, and of such conduct itself": R. v. Hillis, [1996] O.J. No. 2739 (Gen. Div.) (QL), at para. 7. While judicial notice may be taken of the uncontested fact that sexual crimes are almost universally abhorred, this does not establish widespread bias arising from sexual assault trials.

87 The attempt of Vidmar and others to conduct scientific research on jury behaviour is commendable. Unfortunately, research into the effect of juror attitudes on deliberations and verdicts is constrained by the almost absolute prohibition in s. 649 of the Criminal Code against the disclosure by jury members of information relating to the jury's proceedings. More comprehensive and scientific assessment of this and other aspects of the criminal law and criminal process would be welcome. Should Parliament reconsider this prohibition, it may be that more helpful research into the Canadian experience would emerge. But for now, social science evidence appears to cast little light on the extent of any "generic prejudice" relating to charges of sexual assault, or its relationship to jury verdicts.

(g) Conclusions on the Existence of a Relevant, Widespread Bias

88 Do the factors cited by the appellant, taken together, establish widespread bias arising from charges relating to sexual abuse of children? In my view, they do not. The material presented by the appellant, considered in its totality, falls short of grounding judicial notice of widespread bias in Canadian society against the accused in such trials. At best, it establishes that the crime of sexual [page903] assault, like many serious crimes, frequently elicits strong attitudes and emotions.

89 However, the two branches of the test for partiality are not watertight compartments. Given the challenge of proving facts as elusive as the nature and scope of prejudicial attitudes, and the need to err on the side of caution, I prefer not to resolve this case entirely at the first, attitudinal stage. Out of an abundance of caution, I will proceed to consider the potential impact, if any, of the alleged biases on juror behaviour.

2. Is it Reasonable to Infer that Some Jurors May Be Incapable of Setting Aside Their Biases Despite Trial Safeguards?

90 The fact that members of the jury pool may harbour prejudicial attitudes, opinions or feelings is not, in itself, sufficient to support an entitlement to challenge for cause. There must also exist a realistic possibility that some jurors may be unable or unwilling to set aside these prejudices to render a decision in strict accordance with the law. This is referred to as the behavioural aspect of the test for partiality.

91 The applicant need not always adduce direct evidence establishing this link between the bias in issue and detrimental effects on the trial process. Even in the absence of such evidence, a trial judge may reasonably infer that some strains of bias by their very nature may prove difficult for jurors to identify and eliminate from their reasoning.

92 This inference, however, is not automatic. Its strength varies with the nature of the bias in issue, and its amenability to judicial cleansing. In Williams, the Court inferred a behavioural link between the pervasive racial prejudice established [page904] on the evidence and the possibility that some jurors, consciously or not, would decide the case based on prejudice and stereotype. Such a result, however, is not inevitable for every form of bias, prejudice or preconception. In some circumstances, the appropriate inference is that the "predispositions can be safely regarded as curable by judicial direction": Williams, supra, at para. 24.

93 Fundamental distinctions exist between the racial prejudice at issue in Williams and a more general bias relating to the nature of the offence itself. These differences relate both to the nature of these respective biases, and to their susceptibility (or resistance) to cleansing by the trial process. It may be useful to examine these differences before embarking on a more extensive consideration of the potential effects on the trial process, if any, of the biases alleged in the present case.

94 The first difference is that race may impact more directly on the jury's decision than bias stemming from the nature of the offence. As Moldaver J.A. stated in Betker, supra, at p. 441, "[r]acial prejudice is a form of bias directed against a particular class of accused by virtue of an identifiable immutable characteristic. There is a direct and logical connection between the prejudice asserted and the particular accused". By contrast, the aversion, fear, abhorrence, and beliefs alleged to surround sexual assault offences may lack this cogent and irresistible connection to the accused. Unlike racial prejudice, they do not point a finger at a particular accused.

95 Second, trial safeguards may be less successful in cleansing racial prejudice than other types of bias, as recognized in Williams. As Doherty J.A. observed in Parks, supra, at p. 371: "[i]n deciding whether the post-jury selection safeguards against partiality provide a reliable antidote to racial bias, the nature of that bias must be emphasized". The nature of racial prejudice - in particular its subtle, systemic and often unconscious operation - compelled [page905] the inference in Williams that some people might be incapable of effacing, or even identifying, its influence on their reasoning. In reaching this conclusion, the Court emphasized the "invasive and elusive" operation of racial prejudice and its foundation "on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals" (paras. 21-22).

96 The biases alleged in this case, by contrast, may be more susceptible to cleansing by the rigours of the trial process. They are more likely to be overt and acknowledged than is racial prejudice, and hence more easily removed. Jurors are more likely to recognize and counteract them. The trial judge is more likely to address these concerns in the course of directions to the jury, as are counsel in their addresses. Offence-based bias has concerned the trial process throughout its long evolution, and many of the safeguards the law has developed may be seen as a response to it.

97 Against this background, I turn to the question of whether the biases alleged to arise from the nature of sexual assault, if established, might lead jurors to decide the case in an unfair and prejudicial way, despite the cleansing effect of the trial process.

98 First, the appellant contends that some jurors, whether victims, friends of victims, or simply people holding strong views about sexual assault, may not be able to set aside strong beliefs about this crime - for example, that the justice system is biased against complainants, that there exists an epidemic of abuse that must be halted, or that conviction rates are too low - and decide the case solely on its merits. Some jurors, he says, may disregard rules of law that are perceived as obstructing the "truth" of what occurred. Others may simply "cast their lot" with groups that have [page906] been victimized. These possibilities, he contends, support a reasonable inference that strong opinions may translate into a realistic potential for partial juror conduct.

99 This argument cannot succeed. As discussed, strongly held political views do not necessarily suggest that jurors will act unfairly in an actual trial. Indeed, passionate advocacy for law reform may be an expression of the highest respect for the rule of law, not a sign that one is willing to subvert its operation at the expense of the accused. As Moldaver J.A. eloquently observed in Betker, supra, at p. 447, "the test for partiality is not whether one seeks to change the law but whether one is capable of upholding the law...".

100 In the absence of evidence that such beliefs and attitudes may affect jury behaviour in an unfair manner, it is difficult to conclude that they will not be cleansed by the trial process. Only speculation supports the proposition that jurors will act on general opinions and beliefs to the detriment of an individual accused, in disregard of their oath or affirmation, the presumption of innocence, and the directions of the trial judge.

101 The appellant also contends that myths and stereotypes attached to the crime of sexual assault may unfairly inform the deliberation of some jurors. However, strong, sometimes biased, assumptions about sexual behaviour are not new to sexual assault trials. Traditional myths and stereotypes have long tainted the assessment of the conduct and veracity of complainants in sexual assault cases - the belief that women of "unchaste" character are more likely to have consented or are less worthy of belief; that passivity or even resistance may in fact constitute consent; and that some

women invite sexual assault by reason of their [page907] dress or behaviour, to name only a few. Based on overwhelming evidence from relevant social science literature, this Court has been willing to accept the prevailing existence of such myths and stereotypes: see, for example, Seaboyer, supra; R. v. Osolin, [1993] 4 S.C.R. 595, at pp. 669-71; R. v. Ewanchuk, [1999] 1 S.C.R. 330, at paras. 94-97.

102 Child complainants may similarly be subject to stereotypical assumptions, such as the belief that stories of abuse are probably fabricated if not reported immediately, or that the testimony of children is inherently unreliable: R. v. W. (R.), [1992] 2 S.C.R. 122; R. v. D.D., [2000] 2 S.C.R. 275, 2000 SCC 43; N. Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System", in W. S. Tarnopolsky, J. Whitman and M. Ouellette, eds., Discrimination in the Law and the Administration of Justice (1993), 231.

103 These myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social "common sense" in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.

104 Yet the prevalence of such attitudes has never been held to justify challenges for cause as of right by Crown prosecutors. Instead, we have traditionally trusted the trial process to ensure that such attitudes will not prevent jurors from acting impartially. We have relied on the rules of evidence, statutory protections, and guidance from the judge and counsel to clarify potential misconceptions and [page908] promote a reasoned verdict based solely on the merits of the case.

105 Absent evidence to the contrary, there is no reason to believe that stereotypical attitudes about accused persons are more elusive of these cleansing measures than stereotypical attitudes about complainants. It follows that the myths and stereotypes alleged by the appellant, even if widespread, provide little support for any inference of a behavioural link between these beliefs and the potential for juror partiality.

106 Finally, the appellant argues that the strong emotions evoked by allegations of sexual assault, especially in cases involving child complainants, may distort the reasoning of some jurors. He emphasizes that a strongly held aversion to the offence may incline some jurors to err on the side of conviction. Others may be swayed by "undue empathy" for the alleged victim, perceiving the case as a rejection or validation of the complainant's claim, rather than a determination of the accused's guilt or innocence according to law.

107 Again, absent evidence, it is highly speculative to suggest that the emotions surrounding sexual crimes will lead to prejudicial and unfair juror behaviour. As discussed, the safeguards of the trial process and the instructions of the trial judge are designed to replace emotional reactions with rational, dispassionate assessment. Our long experience in the context of the trial of other serious offences suggests that our faith in this cleansing process is not misplaced. The presumption of innocence, the oath or affirmation, the diffusive effects of collective deliberation, the requirement of jury unanimity, specific directions from the trial judge and counsel, a regime of evidentiary and statutory protections, the adversarial nature of the proceedings and their general solemnity, and numerous other precautions both subtle and manifest - all [page909] collaborate to keep the jury on the path to an impartial verdict despite offence-based prejudice. The appellant has not established that the offences with which he is charged give rise to a strain of bias that is uniquely capable of eluding the cleansing effect of these trial safeguards.

108 It follows that even if widespread bias were established, we cannot safely infer, on the record before the Court, that it would lead to unfair, prejudicial and partial juror behaviour. This is not to suggest that an accused can never be prejudiced by the mere fact of the nature and circumstances of the charges he or she faces; rather, the inference between social attitudes and jury behaviour is simply far less obvious and compelling in this context, and more may be required to satisfy a court that this inference may be reasonably drawn. The nature of offence-based bias, as discussed, suggests that the circumstances in which it is found to be both widespread in the community and resistant to the safeguards of trial may prove exceptional. Nonetheless, I would not foreclose the possibility that such circumstances may arise. If widespread bias arising from sexual assault were established in a future case, it would be for the court in that case to determine whether this bias gives rise to a realistic potential for partial juror conduct in the community from which the jury pool is drawn. I would only caution that in deciding whether to draw an inference of adverse effect on jury behaviour the court should take into account the nature of the bias and its susceptibility to cleansing by the trial process.

[page910]

VI - Conclusion

109 The case for widespread bias arising from the nature of charges of sexual assault on children is tenuous. Moreover, even if the appellant had demonstrated widespread bias, its link to actual juror behaviour is speculative, leaving the presumption that it would be cleansed by the trial process firmly in place. Many criminal trials engage strongly held views and stir up powerful emotions - indeed, even revulsion and abhorrence. Such is the nature of the trial process. Absent proof, we cannot simply assume that strong beliefs and emotions translate into a realistic potential for partiality, grounding a right to challenge for cause. I agree with the majority of the Court of Appeal that the appellant has not established that the trial judge erred in refusing to permit him to challenge prospective jurors for cause.

110 I would dismiss the appeal and affirm the conviction.

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TAB 5

Regina v. Potts *

[1982] O.J. No. 3207

36 O.R. (2d) 195

134 D.L.R. (3d) 227

66 C.C.C. (2d) 219

26 C.R. (3d) 252

14 M.V.R. 72

7 W.C.B. 236

Ontario
Court of Appeal

Lacourciere, Houlden and Thorson JJ.A.

February 24, 1982

Douglas Rutherford, Q.C., and Keith Ward, for appellant.

J. Arthur Cogan, Q.C., for respondent.

The judgment of the Court was delivered by

1 THORSON J.A.:-- The issue in this appeal is whether a justice of the peace, on the trial of an information charging a speeding offence on a driveway in the City of Ottawa, was entitled to take notice of the fact that the place where the offence occurred was a driveway under the control and management of the National Capital Commission ("N.C.C."), without that fact having been proved at the trial.

2 The appeal to this Court is from a judgment of Mr. Justice Trainor, who allowed an appeal to him by way of stated case from the conviction of the respondent at his trial and quashed the conviction. The Crown now appeals from the judgment quashing the conviction.

3 The facts as set forth in the case stated by the justice of the peace, and the two questions of law stated by him therein are as follows:

A
THE HISTORY OF THE MATTER

1. On July 11, 1980, an information was laid under oath before a justice of the peace in and for the Judicial District of Ottawa-Carleton by J.B.R. Lebel alleging that the said Ronald Allan Potts, unlawfully did commit the offence of speeding 123 km in a 60 km zone, contrary to s. 5(1) of the National Capital Commission Traffic and Property Regulations, C.R.C. 1978, c. 1044.
2. On January 22, 1981, the trial of the said information was duly heard before me at the City of Ottawa, and upon hearing the evidence adduced and the submissions made by both counsel for the said Ronald Allan Potts and for the Attorney-General of Canada, I found the said Ronald Allan Potts guilty as charged on the said information and convicted him thereof but at the request of counsel for the said Ronald Allan Potts, I state the following case for the consideration of this Honourable Court.

B
FACTS

3. I found as a fact that Ronald Allan Potts was the driver of a 1978 Chevrolet Corvette, bearing Ontario licence number MYK 664, on July 9, 1981.
4. I further found as a fact that the said Ronald Allan Potts was driving the said vehicle on Colonel By Drive in the City of Ottawa in the Judicial District of Ottawa-Carleton.
5. I further found that Constable J.B.R. Lebel of the Royal Canadian Mounted Police was on patrol in a police vehicle on July 9, 1980, on Colonel By Drive.
6. I further found that the said Constable Lebel was operating a radar unit, which unit was functioning properly.
7. I further found that the said Constable Lebel clocked Ronald Allan Potts with his radar device at approximately one-half hour past 10:00 o'clock in the evening of July 9, 1980, on Colonel By Drive at the Hartwell Locks in the City of Ottawa, in the Judicial District of Ottawa-Carleton.
8. I further found that the said Constable Lebel clocked the said Ronald Allan Potts at 123 km p.h.
9. I further found that the posted speed limit on Colonel By Drive was 60 km p.h.
10. I further took judicial notice of the fact that Colonel By Drive in the City of Ottawa in the Judicial District of Ottawa-Carleton was National Capital Commission property as there was no evidence of ownership introduced at trial such that the National Capital Commission Traffic and Property Regulations applied with respect to the traffic offences committed on the said Colonel By Drive.
11. I further found that, as a result of the said Ronald Allan Potts having operated a motor vehicle in excess of the posted speed limit on National Capital Commission property; the said Ronald Allan Potts did commit the offence of speeding 123 km p.h. in a 60 km p.h. zone, contrary to s. 5(1) of the National Capital Commission Traffic and Property Regulations.

THE QUESTIONS OF LAW

1. Did I err in law in finding that the specific location where the radar unit was situate on Colonel By Drive was a "driveway" controlled by the National Capital Commission such that the provisions of the National Capital Commission and Property Regulations made pursuant to the National Capital Act, R.S.C. 1970, c. N-3, applied in the absence of any proof at trial that the said location on Colonel By Drive was under the control of the National Capital Commission.
2. Did I err in law in taking judicial notice of the finding made in Q. 1.

4 Mr. Justice Trainor, in allowing the appeal and quashing the conviction, endorsed the record as follows:

> I answer the question submitted in the stated case in the affirmative. Without attempting to define or restrict the doctrine of judicial notice, save with respect to the facts of this case, I have concluded that the boundaries of federal and provincial jurisdiction are not notorious in the sense that by physical inspection one could readily ascertain the appropriate jurisdiction. The case is unlike that of taking a judicial notice that a street in the town of Lindsay is within a built-up area. Secondly, the fact that the legislation has facilitated proof by allowing a certificate to be filed is indicative of legislative intent that areas of federal jurisdiction be proved as an essential element of the case.
>
> The conviction is quashed.

5 In this case the offence charged in the information was an offence under s. 5(1) of the National Capital Commission Traffic and Property Regulations, C.R.C. 1978, c. 1044, made pursuant to s. 19 of the National Capital Act, R.S.C. 1970, c. N-3. Section 5(1) of the regulations reads as follows:

> 5(1) No person shall operate a vehicle on a driveway at a rate of speed greater than the speed posted for that driveway.

The word "driveway" is defined in s. 2(1) of the regulations, the relevant portion of which reads as follows:

> 2(1) In these Regulations,
>
> . . . . .
>
> "driveway" means that part of the property of the Commission designated and intended for the use of vehicles;

The expression "property of the Commission" is defined in s. 2 of the National Capital Act as follows:

> 2. In this Act
>
> . . . . .
>
> "property of the Commission" means property under the control and management of, or vested in the name of, the Commission;

6 By virtue of s. 15 of the Interpretation Act, R.S.C. 1970, c. I-23, this definition in the National Capital Act is carried into the regulations so that the expression "property of the Commission" has the same meaning in the Regulations as it has in the Act itself. Thus on the facts as set out in the stated case, the case against the respondent was made out if the justice of the peace was entitled to take judicial notice of the fact that, at or in the vicinity of the Hartwell Locks on the Rideau Canal, Colonel By Drive is a driveway which is either "under the control and management" of the Commission or "vested in the name of" the Commission.

7 In his submission to this Court on behalf of the appellant, Mr. Rutherford made the point that there is a considerable difference between the concept of "control and management" and that which is denoted

by the words "vested in". He pointed out that the first of these is concerned with administration and maintenance while the latter denotes ownership or title, and that the two are not necessarily coincidental or concurrent. He further submitted that "control and management" consists of acts which may be factually observed by anyone, whereas "ownership or title" expresses a legal relationship which is ultimately verifiable only in a court of law.

8 His submission, accordingly, was that it was open to the justice of the peace at trial to conclude that Colonel By Drive in the City of Ottawa was a "driveway" within the meaning of the regulations in question by considering that the acts of control and management by the N.C.C. over Colonel By Drive were sufficiently notorious in the City of Ottawa that judicial notice could properly be taken of them. This, therefore, was unlike a case where the court has purported to take judicial notice of such things as the location of a municipal boundary, the limits of federal and provincial jurisdiction as a matter of law, or the existence of title to land.

9 Mr. Rutherford then invited the Court to consider a "typical" driveway location "somewhere" in the National Capital area in terms of what any ordinary person, travelling along the driveway and observing the passing scene, could expect to encounter if in fact that driveway happened to be under the control and management of the N.C.C. The picture he painted of such a "typical" driveway (which might or might not be Colonel By Drive) was of a broad, generally well-tended and beautifully landscaped thoroughfare following along the contours of perhaps the Ottawa River or perhaps the Rideau Canal, kept salted and sanded in the winter months by work crews in vehicles bearing the insignia of the N.C.C., and kept groomed and in repair in other more salubrious seasons by crews working out of similar N.C.C. vehicles. In the springtime the traveller along such a driveway could expect to encounter nearby vast beds of tulips, the famed (and no doubt judicially noticeable) royal Dutch gift of thanks to the Canadian people. On Sunday mornings in the summertime, the same traveller could expect to meet N.C.C. personnel placing barriers across the roadway reserving it for a time for use only by people on bicycles, and in the wintertime he might see similar barriers being erected by N.C.C. personnel to protect skaters seeking to gain access to what could be the Rideau Canal, at locations where skaters' huts maintained by the N.C.C. are to be found.

10 In all seasons, a further significant indication of the Commission's "presence" would be the distinctive "white-on- black" N.C.C. traffic signs to be seen at intervals along the whole length of the driveway, displaying in both official languages and over the Commission's name such information as the name of the driveway and its posted maximum speed. Finally the motorist on the driveway would soon enough observe that the entire driveway was being patrolled by police vehicles bearing the markings of the Royal Canadian Mounted Police and manned, one might guess, by personnel of the same organizational persuasion. From this it could further be guessed that the driveway in question was under an administration different from that governing streets and highways elsewhere in the City of Ottawa which are municipally or provincially policed.

11 The point, of course, of counsel's most vivid and evocative imagery, which I have sought to reproduce faithfully here, is that all of these things would be readily observable factual manifestations of the N.C.C.'s control and management of a "typical" driveway if that driveway happened to come under the control and management of the N.C.C. The further point to which this in turn leads is that in the instant case of Colonel By Drive, these very same manifestations of the Commission's control and management are so familiarly present, and they are so compelling of the obvious inference which is to be drawn from the fact of their presence, as to make it "notorious" in the City of Ottawa that Colonel By Drive is indeed under the control and management of the Commission and is thus "property of the Commission" within the meaning of its Traffic and Property Regulations.

12 Counsel for the respondent did not at any earlier stage in this case contest the fact that his client

was breaking some speed limit in Ontario when the vehicle his client was driving was clocked by the radar unit at 123 km. More significantly, however, counsel for the respondent did not at any earlier stage seek to argue that Colonel By Drive was not property of the Commission, or that the finding made at trial based on the matter judicially noticed would not have been warranted if some evidence had been led to establish the status of the driveway as "property of the Commission", to which the regulations rather than the ordinarily applicable provincial Highway Traffic Act, R.S.O. 1980, c. 198, was an essential element of the Crown's case, and in the absence of any evidence as to that matter it was not proved, nor could it be, by the taking of judicial notice of it.

13 As is evident from Trainor J.'s endorsement set out earlier in these reasons, one of the arguments made in the court below on behalf of the respondent was that because, in s. 23 of the regulations, provision is made for proving the ownership or the control and management by the Commission of property by means of a certificate (which when received in evidence is then prima facie proof of the statements contained therein), that section can itself be looked to as indicating a legislative intent that this be proved as an essential element of the Crown's case. On the appeal to this Court, counsel conceded that s. 23 does not have the effect of precluding a trial court from accepting and relying on other methods of proof of the same fact or matter. However, he maintained his assertion that the matter had to be affirmatively proved as an element of the Crown's case, and that this could not be done by the taking of judicial notice of it.

14 With great respect to Trainor J. who essentially agreed with counsel for the respondent in this submission, I think the justice of the peace acted entirely properly in taking judicial notice of the status of this driveway in the case before him.

15 Judicial notice, it has been said, is the acceptance by a court or judicial tribunal, without the requirement of proof, of the truth of a particular fact or state of affairs that is of such general or common knowledge in the community that proof of it can be dispensed with. The doctrine is thus said to be an exception to the general rule that a judge or jury may consider only evidence which has been tendered in court and may not act on personal knowledge (see McWilliams, Canadian Criminal Evidence (1974), at p. 379). As Lord Sumner put it in Commonwealth Shipping Representative v. Peninsular & Oriental Branch Service, [1923] A.C. 191 at 211:

> ... to require that a judge should affect a cloistered aloofness from facts that every other man in Court is fully aware of, and should insist on having proof on oath of what, as a man of the world, he knows already better than any witness can tell him, is a rule that may easily become pedantic and futile.

Thus it has been held that, generally speaking, a court may properly take judicial notice of any fact or matter which is so generally known and accepted that it cannot reasonably be questioned, or any fact or matter which can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned.

16 As to what constitutes general or "common" knowledge, the following passage in McWilliams at p. 380, citing G. D. Nokes in "The Limits of Judicial Notice", 74 L.Q.R. 59 (1958) at p. 67, is, I think, instructive:

> "Judicial notice of matters of fact is founded upon that fund of knowledge and experience which is common to both judges and jurors and is not confined to the Bench. In many cases no reference is made during the trial to this aspect of judicial notice; if the fact is relevant, everyone in court will assume that rain falls, for example; and there is no ascertainable limit to the matters which are thus silently

> noticed by both judge and jury. But when a fact less obviously forms part of mankind's fund of common knowledge, it may be necessary for counsel to request the judge to take judicial notice; and in such cases the judge must exercise a discretion whether to do so, which is merely another way of saying that he must decide whether the fact falls within the rule as being notorious. ... [C]ommon knowledge differs with time and place, so a fact which was notorious a century ago may no longer be the appropriate subject of notice, and a fact may be common knowledge only among a class of the community, such as those interested in a particular sport ... Thirdly, though a judge may consider a fact to be the appropriate subject of notice, he may not himself remember or profess to know it, and therefore he may take steps to acquire the necessary knowledge."

(Emphasis added.)

17 Stanley A. Schiff, in Evidence in the Litigation Process, vol. 2 (1978), at pp. 663-67, gives an interesting example in the case of Varcoe v. Lee et al. [181 P. 223, 180 Cal. 338 (1919)], a decision of the Supreme Court of California in which one of the issues at trial was whether the defendant had violated in a "business district" of the City of San Francisco the prevailing speed limit, which in that less hurried day and long before high-speed chases through the streets of that city had become a cinematic cliche, was 15 m.p.h. In that case, and with what appears to have been some judicial impatience, the court began by noting that at p. 664:

> The actual fact of the matter is, however, that Mission street, between Twentieth and Twenty-Second streets, is a business district, within the definition of the Motor Vehicle Act, beyond any possibility of question. It has been such for years. Not only this, but its character is known as a matter of common knowledge by any one at all familiar with San Francisco.

The court continued as follows:

> It would have been much better if counsel for the plaintiff or the trial judge himself had inquired of defendants' counsel, before the case went to the jury, whether there was any dispute as to the locality being a business district within the meaning of the state law. There could have been but one reasonable answer, and, if any other were given the matter could have easily settled beyond any possibility of question. But this was not done, and we are not confronted by the question whether either this court or the trial court can take judicial notice of the real fact.
>
> An appellate court can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice. ...
>
> In fact, a particularly salutary use of the principle of judicial notice is to sustain on appeal, a judgment clearly in favour of the right party, but as to which there is in the evidence an omission of some necessary fact which is yet indisputable and a matter of common knowledge, and was probably assumed without strict proof for that very reason. ...
>
> The question, therefore, is: Was the superior court for the city and county of San Francisco, whose judge and the talesmen were necessarily residents of the city, entitled to take judicial notice of the character of one of the most important and best-known streets in the city? If it were, the court was authorized to charge the jury as it

did.

(Emphasis added.) Later, at p. 665, the court made this observation:

> It is truly said that the power of judicial notice is, as to matters claimed to be matters of general knowledge, one to be used with caution. If there is any doubt whatever, either as to the fact itself or as to its being a matter of common knowledge, evidence should be required; but, if the court is of the certain opinion that these requirements exist, there can properly be no hesitation. In such a case there is, on the one hand, no danger of a wrong conclusion as to the fact -- and such danger is the reason for the caution in dispensing with the evidence -- and, on the other hand, purely formal and useless proceedings will be avoided.
>
> Little assistance can be had by a search of the authorities for exactly similar cases. ... What may be a proper subject of judicial notice at one time or place may not be at another.

18 More recently this court has had occasion to consider a similar kind of question. In R. v. Bednarz (1961), 130 C.C.C. 398, 35 C.R. 177, the question was whether an assault had occurred, as alleged in the information, "at the Township of Kendry" in the Cochrane District. The magistrate had registered a conviction based on evidence of the assault having taken place in the area of a T.V. tower two miles east of Smooth Rock Falls. No witness had testified that this place lay within the Township of Kendry. Counsel for the appellant thus argued that because the place of the offence, as stated in the information, was an essential ingredient of the charge which the Crown had to establish and there was no evidence as to that matter, the conviction should be quashed.

19 Morden J.A., speaking for the Court of Appeal, rejected this argument in these terms at p. 400 C.C.C.:

> Assuming that it was an essential part of the Crown's case to establish that the offence was committed in the Township of Kendry, I am satisfied that this was done. Sitting in this Court, we are unable to take judicial notice that the place described as above in the evidence was situate in the Township of Kendry. However, our inability in this respect is immaterial. There could have been no doubt in the mind of any one taking part in this trial with respect to the place where the offence was committed. Nor was it suggested in this Court that the offence charged was committed in some township other than Kendry. If that had been proved, the Magistrate could have amended the information to conform with the evidence.
>
> The short point is, -- could the Magistrate sitting at Smooth Rock Falls take judicial notice of the fact that the micro-wave or T.V. tower at Unionville, which was 2 miles east of Smooth Rock Falls, was located in the Township of Kendry? In my opinion he could, and I assume he did, take notice of this fact, the truth of which if it had been disputed, and it was not, would have been capable of quick and accurate demonstration. Formal proof of that fact, which was obviously within the knowledge of the Magistrate, the Crown counsel and the accused, was unnecessary. I refer with approval to the careful reasons of Kelly J. in R. ex rel. White v. Fudell, 116 Can. C.C. 67, [1956] O.W.N. 609, where an argument similar to that now advanced on behalf of the appellant failed. Any other decision upon the point of law reserved in this case would invite the reproach that justice was being administered in disregard of the plain realities of the situation.

(Emphasis added).

20 There are, it seems to me, at least two distinct threads running through these cases. The first has to do with the standard to be applied in determining what is common knowledge, and the point which the cases make is that what constitutes common knowledge is to be judged by reference to that which is common knowledge in the community where and when the issue is being tried. The second has to do with the proper function of an appellate court, sitting on an appeal from a decision applying a community standard of common knowledge. Each of these merits a brief comment.

21 Where judicial notice of some matter is taken by a trial court, the trier of the facts (whether judge alone or jury) may or may not share the knowledge that is said to be common knowledge in the community or in a particular class of the community. If it happens that the court does share a personal knowledge of that which is commonly known in the community, well and good. If not, however, the matter may still be judicially noticed, but the court is put on its inquiry as to whether the matter is or is not one which may properly be made part of the case before it without formal proof thereof. Conversely there is the situation where the knowledge that the court has about a particular matter is knowledge of a kind which the court is required to apply repeatedly in the cases that come before it day by day. In R. v. Miller (1971), 4 C.C.C. (2d) 70, 15 C.R.N.S. 164, the learned County Court judge, speaking of the procedures that are involved in taking samples of a person's breath for breathalyzer testing, concluded that, on the authorities he had reviewed, "it is possible for a Court to take judicial notice of matters that are repeatedly before it" (p. 80 C.C.C.). While in principle this appears to make a good deal of sense, at least where the matters being noticed are not really disputed, it is nevertheless clear that a trial court is not justified in acting on its own personal knowledge of or familiarity with a particular matter, alone and without more.

22 As for an appellant court, the cases also make it clear that it is not its function to adjudicate upon the correctness of a trial court's decision to take judicial notice of some fact or matter known locally, relying solely upon the appellate court's knowledge of (or, for that matter, its lack of knowledge of) that which was noticed in the court below, unless of course that same knowledge is in the larger public domain. While no member of an appellate court is obliged to "check at the doorway to the court-house" his own personal knowledge and experience of the world around him, in the very nature of an appellate court, particularly in a jurisdiction as geographically vast as Ontario, it is highly improbable that each of its members will share personally in the knowledge that is "common knowledge" in the diverse communities from which it draws its cases. It is, for example, no more than pure chance that the writer of these reasons, as a result of long residence in the City of Ottawa, happens to be very familiar with the driveway known as Colonel By Drive, that he has many times seen and admired Mr. Rutherford's pictured tulips, skated along his canal, cycled along the driveway, and of course, made dutiful mental note of the speed limit posted on its traffic signs. Yet all this is indeed "immaterial", as Morden J.A. correctly stated in R. v. Bednarz, supra. What in my opinion is material is that the justice of the peace in Ottawa who heard this case was warranted in making the decision he did regarding the status of this driveway as "property of the Commission", on the basis of the public notoriety of that matter in the National Capital area.

23 I accept the argument of counsel for the appellant that this case is unlike those in which a court has purported to take judicial notice of such things as the ownership of land or the location of a municipal boundary. In the case at bar, counsel for the respondent sought to rely on the decision of Robins J. as he then was, in R. v. Eagles (1976), 31 C.C.C. (2d) 417. In that case the accused had been charged with a speeding offence in the City of Sarnia where the speed limit was 30 m.p.h. The speed limit just outside the city boundary was 50 m.p.h. and the accused was stopped while entering the city after having been clocked through the radar at 48 m.p.h. There was no evidence that the point where the accused allegedly

committed the offence was in fact within the Sarnia city limits. Robins J. quashed the conviction, holding that judicial notice could not be taken of the fact, which was essential to the proof of the Crown's case.

24 I do not disagree with that result. In that case the circumstances required that actual evidence be given as to the location of the city limits in relation to the place where the alleged offence occurred. There was no evidence of any sign advising motorists that they were entering the city and the accused had given evidence that he was unfamiliar with the City of Sarnia. That is not this case. In this case no issue arises as to any such line of demarcation; the speed limit on Colonel By Drive at the location where the offence occurred is likewise not in issue and the defendant gave no evidence at his trial. As Linden J. remarked R. v. Redlick (1978), 41 C.C.C. (2d) 358, 2 C.R. (3d) 380, distinguishing the case before him from that in R. v. Eagles "As in so many things, it all depends on the circumstances" (p. 359 C.C.C.). Although he thought that normally evidence is required as to the location of the offence when its location is an essential element of that offence, he was of the opinion that such evidence need not be given in all cases, especially when it was obvious to everyone involved in the trial that the offence occurred within the area specified.

25 In this case, it was not until after the taking of evidence had been concluded without any evidence having been given by the respondent that the latter's counsel first raised the point that no evidence had been adduced by the Crown as to the status of this driveway. Counsel of course was within his rights in waiting until then to raise this point, but even then the driveway's status as property of the Commission was not disputed by him. In my opinion its status was not disputed, as clearly as it could have been, precisely because it could only have been obvious to all those who took part in the trial what the outcome of the dispute would have been. In these circumstances, I cannot accept that it was incumbent upon the Crown to prove a matter which did not need to be proved, or that the justice of the peace erred in proceeding to convict the respondent in the absence of its proof.

26 For the reasons given, I would allow the appeal, set aside the acquittal and restore the conviction of the respondent for the offence charged in the information.

Appeal allowed.

N THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,*
.S.C. 1985, c. C-36 AND IN THE MATTER OF A PLAN OF COMPROMISE OR
RRANGEMENT OF INDALEX LIMITED et al. the Applicants

Court File No: CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

REPLY BOOK OF AUTHORITIES OF THE RETIREES

(Returnable July 24, 2013)

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