

The Five Most Significant Decisions of the Courts in 2006-2007

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Introduction

Over the last year, the Supreme Court of Canada handed down 60 judgments.² The Ontario Court of Appeal decided many more. Selecting just five is always a daunting challenge. More than five of the cases are significant for various reasons and there is room for great differences of opinion about what is significant.

Decisions which make headlines are not necessarily legally significant. Conversely, cases which may greatly impact the way lawyers practice may attract little media attention and collective yawns from a disinterested public.

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² Kirk Makin, "Top Court working full-bore, McLachlin says," Globe and Mail, August 13, 2007.

A Word about the American Trial of Conrad Black et al.

It has become the tradition of this paper to note some of the legal events of our times. In this spirit, we call attention to the passage of a case which is neither significant to Canadian jurisprudence nor is it a decision of the Canadian courts. However, it did capture the attention of Canadians for many months.

To record the events of our times, we note the attention paid to the trial, convictions and partial acquittals of Conrad Black, (Lord Black of Crossharbour) Peter Atkinson, Jack Boulton and Mark Kipnis, which took place in Chicago during the spring and summer of 2007.

From March to July 2007, former Canadian press baron, Conrad Black, who famously gave up his Canadian citizenship to become a British peer, Lord Black of Crossharbour, two business associates and in-house legal counsel were tried for fraud and obstruction of justice in Chicago, Illinois. The charges arose from the sale of Hollinger Inc.'s newspaper empire for \$3.2 billion dollars in 2004. In the course of the sale, Black and several associates personally received more than \$60 million as non-compete payments.³ The American prosecutors alleged that the non-compete payments belonged to Hollinger's shareholders not to Black.

Black's long-time business partner, David Radler, who was also charged with the same

³ According to reports, some defendants received significantly more than others. Kipnis did not receive any amount. Atkinson and Boulton returned the amounts they received.

offences, agreed to testify for the prosecution in exchange for a plea bargain to a single fraud conviction and the prosecutor's recommendation for a lighter sentence. Radler's evidence was broadly discredited. The jury acquitted Black and the others most, but not all, of the charges on which Radler implicated them. There was a media circus around this case. Nearly every Canadian media outlet had its correspondent present with nightly commentary and a sound byte.

The Canadian public and legal community had a virtually insatiable appetite for the events surrounding Lord Black's trial, including photo-ops of his wife, Barbara Amiel and comments by his lawyer, Toronto Canadian criminal law icon, Eddie Greenspan, who conducted much of Black's defence.

On July 13, 2007⁴, after 12 days of deliberation, the jury found Conrad Black, Jack Boulton, Peter Atkinson and Mark Kipnis guilty of four of the 13 charges against them.⁵ At the time of this writing, sentencing is due to take place on November 30, 2007 but the defendants have filed appeals for a reversal of the jury's verdict and motions for a new trial.⁶ The Conrad Black trial was not one of the five most significant cases of the year but it showed how interested we are when the rich and famous fall from grace and more so, when they are Canadians.

This was a calamitous defeat for Conrad Black and his colleagues. Even though they were acquitted on nine more serious charges involving non-compete payments of

⁴ R. Siklos, "Shades of Black" *Globe and Mail*, July 21, 2007

⁵ See www.thestar.com/News/article/235905.

⁶ See www.thestar.com/News/Canada/article/250490.

more than US\$55 million, conviction on the four charges has already had a stinging effect on their reputations and net worth and if the verdicts withstand appeal, they are likely to spend time in jail. Boulton and Atkinson have disgorged all of the funds they received as non-compete payments. Kipnis did not receive any money at all. Pending appeal, Black was required to remain in the United States, limited to Chicago and to Palm Beach, Florida.

Anecdotally, many Canadian lawyers thought the charges against Black and his associates were excessive and the trial result showed this to be true. Time will tell whether the convictions stand and whether Lord Black and the other defendants must serve jail terms. According to surveys, however, a majority of Canadians thought Black should serve time in jail⁷ and some have suggested that his Order of Canada designation should be revoked.⁸

Our Selection of the Most Significant Cases

The five most significant cases this year are:

- 1) *Re Truscott*, August 28, 2007, 2007 ONCA 575 (McMurtry C.J.O., and Doherty, Weiler, Rosenberg and Moldaver JJ.A.): The Ontario Court of Appeal overturned a murder conviction wrongly made 48 years ago. Although Truscott was acquitted, the absence of DNA evidence prevented the Court from declaring his innocence.

- 2) *R. v. Clayton*, July 6, 2007, 2007 SCC 32 (Full SCC): The scope of police powers in arbitrary detention or imprisonment, unreasonable searches and

⁷ See www.thestar.com/News/Canada/article/241197.

⁸ See www.thestar.com/News/Canada/article/237092.

- seizures and a retreat of the exclusion of tainted evidence in crimes involving guns; and on the same topic, *R. v. L.B.*, September 5, 2007, 2007 ONCA 596 (Ont. C.A.: Moldaver, MacPherson, and Cronk JJ.A.):
- 3) *Canada (Attorney General) v. Hislop*, March 1, 2007, 2007 SCC 10 (McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Abella and Rothstein JJ.): Retroactive Canada Pension Plan compensation and survivorship benefits for same-sex spouses;
 - 4) *Charkaoui v. Canada (Citizenship and Immigration)*, February 23, 2007, [2007] 1 S.C.R. 350 (Full SCC): Scope of *Charter* rights of persons detained under security detention certificates pursuant to the *Immigration and Refugee Protection Act*⁹("IRPA"); and
 - 5) *Pecore v. Pecore*, May 3, 2007, 2007 SCC 17 and *Madsen Estate v. Saylor*, May 3, 2007, 2007 SCC 18 (Full SCC for both cases): Scope of the presumption of resulting trust where an aging parent transfers property into a joint account with one or more children.

Analysis of the Five Most Significant Cases

Re Truscott (Ont. C.A. August 29, 2007)

Re Truscott demonstrates that even 48 years later, the administration of justice has the capacity to right a miscarriage of justice. It demonstrates the procedures our justice system has developed are flexible enough to allow for miscarriages of justice to be corrected, notwithstanding that they may take years to implement while a wrongly convicted person languishes in jail. Stephen Truscott spent his teen years and early adulthood in jail and the next 38 years under the cloud of being a convicted

⁹ S.C. 2001, c. 27.

murderer but he has lived to see the declaration of his acquittal. Justice was certainly delayed for Truscott but happily, not denied. The passage of time did, however, result in the destruction of DNA evidence and this made it impossible for the Court of Appeal to declare his innocence.

The Truscott case has been part of our legal and even our cultural landscape for nearly 50 years. Steven Truscott was found guilty in 1959 of the murder of his 12-year-old schoolmate Lynne Harper in 1959, when he was 14 and sentenced to death. As recorded in a plethora of online references¹⁰, Truscott was the youngest person to be sentenced to death in Canada, and his case was a major impetus toward the abolition of the death penalty in Canada.¹¹ There have been books written about the Truscott case, university classes have studied it, The Canadian band Blue Rodeo wrote the song "Truescott", and the late Pierre Berton, a great Canadian author, penned a poem entitled "Requiem for a Fourteen-Year-Old".¹² Few cases in Canadian history have ignited our passion to see justice done as much as this one.

Truscott spent the next four months believing he was going to be executed for a crime he did not commit. His appeal to the Ontario Court of Appeal was dismissed on January 20, 1960 but his sentence was commuted to life imprisonment by Prime Minister Diefenbaker the next day.¹³ He would spend the next 10 years in jail until he

¹⁰ There are 627 references to Stephen Truscott case on www.google.ca. Interesting background material is also available www.cbc.ca/fifth/truscott/index.html, which expands on a Fifth Estate episode about the case.

¹¹ http://en.wikipedia.org/wiki/Steven_Truscott

¹² www.cbc.ca/fifth/truscott/poem.html See Appendix to this paper.

¹³ http://archives.radio-canada.ca/IDC-1-73-625-3339/politics_economy/death_penalty/clip5. Prime Minister Diefenbaker, a criminal defence counsel in Sask. before he entered politics was strongly opposed to capital punishment and led the move to abolish the death penalty in Canada.

was paroled in 1969.

On April 26, 1966, the federal government referred the case to the Supreme Court of Canada. On May 4, 1967, after hearing five days of evidence, including Truscott himself, the Supreme Court dismissed the appeal, Justice Emmett Hall dissenting. After his release, Truscott lived a quiet, productive life with his wife and three children, using his mother's maiden name to maintain his anonymity. In 1997, still declaring his innocence, Truscott asked for DNA tests which would exonerate him, but by that time the exhibits had been destroyed.

In November 2001, a review application was made to the federal government and in January 2002 retired Quebec Court of Appeal Justice Fred Kaufman was appointed by the federal government to review the murder conviction.¹⁴

Under s. 696.3 of the *Criminal Code*¹⁵, the Minister of Justice must be satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. The Minister may then either (1) direct a new trial or (2) refer the matter to the Court of Appeal of the province where the accused was tried to be heard as a new appeal.¹⁶ On October 28, 2004, following Justice Kaufman's voluminous report, Justice Minister Irwin Cotler directed a ministerial review to the Ontario Court of Appeal.¹⁷ In directing a ministerial review, the Minister of Justice is not making a

¹⁴ http://canada.justice.gc.ca/en/news/nr/2004/doc_31272.html

¹⁵ R.S.C. 1985, C. c-46.

¹⁶ See www.justice.gc.ca/en/news/nr/2007/doc_32049.html.

¹⁷ http://canada.justice.gc.ca/en/news/nr/2004/doc_31270.html

finding of guilt or innocence but simply returning the matter to the courts in circumstances where there is a reasonable basis to conclude that a miscarriage of justice likely occurred.¹⁸

A five-judge panel of the Ontario Court of Appeal (McMurtry CJO, Doherty, Weiler, Rosenberg and Moldaver JJ.A.) heard three weeks of testimony and fresh evidence, including challenges to the autopsy report that narrowed Harper's time of death, and testimony of then-children whose evidence was not disclosed to the defence at the trial. On August 28, 2007, the Court of Appeal unanimously acquitted Truscott, stating that his conviction was a miscarriage of justice.¹⁹ One cannot improve on the synopsis of the decision issued by the Court of Appeal and posted on the Court's website.²⁰ For ease of reference, it is annexed as a Schedule to this paper.

Sections 696.1-696.6 of the *Criminal Code* are the conviction review provisions built in to our legal system that allow the flexibility necessary to review cases where there has been a potential miscarriage of justice. These sections have allowed numerous cases to be reviewed. From 1995 to 2003, 53 wrongful conviction decisions were rendered. Of those, 12 were granted new trials or moved to the Court of Appeal.²¹

Re Truscott is significant not only because of the media attention that it attracted over the last 47 years, but also because it shows that notwithstanding the length of

¹⁸ See www.justice.gc.ca/en/news/nr/2007/doc_32049.html.

¹⁹ *Re Truscott*, *supra* note 6 at para. 3. See also the excellent summary of the decision on the website of the AIDWYC: www.aidwyc.org/library.cfm?fa=download&resourceID=108295&print

²⁰ www.ontariocourts.on.ca/decisions/2007/august/2007ONCA0575synopsis.htm

²¹ See www.digitaljournal.com/news/?articleID=4169.

time or the opposition encountered, our system has the capacity to correct serious miscarriages of justice if the wrongly convicted person has the stamina and determination to see the process through.

The case also focuses fresh attention to the cases of other persons wrongly convicted of serious crimes. The Association in Defence of the Wrongly Convicted (AIDWYC) is a volunteer organization dedicated to preventing and rectifying wrongful convictions.²² It is important for lawyers who practice in other areas to know that such organizations exist so that persons who need assistance can be appropriately directed.

R. v. Clayton (SCC July 6, 2007) and R. v. L.B. (Ont. C.A. September 5, 2007)

A headline in the September 7, 2007 issue of the *Toronto Star* reads “Will rights be ignored in gun crimes?”²³ An article in the *Globe and Mail* announces “A New Slant on the Charter”²⁴ What is going on? Have the defenders of the Charter lost their way? There does appear to be a recent shift in judicial emphasis between Charter rights and public security where guns and weapons are involved.

In *R. v. Clayton*, the Supreme Court ruled that the police acted constitutionally when they set up a roadblock outside a Toronto-area strip club and searched two men based on a tip from a 911 caller, who stated that certain “black guys” in a parking lot were openly displaying handguns. Nevertheless, the Court held that the police used their

²² www.aidwyc.org/

²³ www.thestar.com/article/254150

²⁴ www.theglobeandmail.com/servlet/story/LAC.20070907.APPEAL07/PPVStory/?DENIED=1

powers without violating the *Charter* or the *Criminal Code* because the 911 call provided them with the reasonable and probable grounds necessary to believe that there were several handguns in a public place and that justified their stop and search of Clayton and Farmer.

On September 24, 1999, following the 911 call, police set up a roadblock at the rear exit of the parking lot and a car left the area identified by the 911 caller and drove towards them. This was not one of the four cars referred to by the 911 caller. The officers, on stopping the car, observed that the occupants, Clayton and Farmer, were black males. Clayton stepped out of the car as requested but stood blocking the officer's view of the inside of the car. When the officer put his hand on Clayton's shoulder to direct him to the back of the car, Clayton shoved the police officer and ran away. Two officers chased Clayton and after he was subdued he was searched and a prohibited handgun was found in his pocket. Farmer was then arrested for possession of a loaded prohibited weapon and when he was searched a loaded prohibited handgun was found under his jacket.

The trial judge held that the initial stop of both Clayton and Farmer was lawful but that their further detention and search violated ss. 8 and 9 of the *Charter*. The trial judge did, however, admit the evidence under s. 24(2) of the *Charter*. Both Clayton and Farmer were convicted of carrying concealed weapons and the possession of loaded, prohibited firearms but the convictions were overturned on appeal. The Ontario Court of Appeal held that handgun evidence was not admissible and the

“roadblock” was unlawful because there was no imminent danger and because the police did not style their intervention to stop only the four vehicles identified in the 911 call. Doherty J.A. held that had the police properly tailored their response, Farmer and Clayton’s vehicle would not have been detained and therefore, their detention and subsequent searches violated ss. 9 and 8 of the *Charter*. The Court of Appeal also criticized the police for a “systemic” search, by sending police officers who were inadequately trained, undersupervised and “sadly ignorant” of constitutional rights to the scene.

The Supreme Court, applying the two part police powers common law test²⁵ held that the police’s detention of Clayton and Farmer was constitutional even though their vehicle did not match the 911 caller’s description. Abella J. referred to evidence that the 911 caller had identified the presence of ten “black guys” and both Clayton and Farmer were of that ethnicity; the possession of handguns is a serious offence that presented a possibility of risk to the public, and that only those leaving the parking lot were restricted in their movement. Abella J. found the searches justifiable because the police had reasonable grounds to conclude the two occupants of the car were implicated in the crime being investigated: the two men were of the ethnicity identified by the 911 caller, they gave evasive answers to questions posed by the police, and the passenger was wearing gloves, despite the fact that, as the officer

²⁵ The common law test as to police powers of detention is discussed in *R. v. Clayton* paras. 21-22. See www.canlii.org/en/ca/scc/doc/2007/2007scc32/2007scc32.html. In short, the Crown must show that 1) the police were acting in the exercise of a lawful duty when they engaged in the conduct in issue; and 2) that the impugned conduct amounted to a justifiable use of police powers associated with that duty. Abella J. observes that “[t]hese powers are . . . consistent with *Charter* values because it requires the state to justify the interference with liberty based on criteria which focus on whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk. The standard of justification must be commensurate with the fundamental rights at stake.”

observed, it was “not glove weather”. Abella J. further held that their section 8 rights were not infringed because the search was incidental to a lawful investigative detention. The remedial provisions of s. 24(2) were not considered because no Charter violations were found.²⁶

R. v. L.B. released by the Ontario Court of Appeal only two months after *R. v. Clayton*, is a Crown appeal from a young person’s acquittals on one count of possession of a loaded restricted firearm and seven other gun and gun-related counts. *R. v. Clayton* is not referred to by the Court. The seminal issue at trial and in the appeal was whether L.B. was detained when, in response to a question from a police officer, declined ownership of a knapsack in which his school work was found, along with a loaded .22 calibre handgun. The trial judge excluded the gun from evidence under s. 24(2) of the *Charter* and the young person was acquitted on all counts because the trial judge found that L.B. had been arbitrarily detained by the police officers; they failed to inform L.B. of his right to counsel; and had no lawful authority to search the knapsack contravention.

The trial judge held that these actions contravened L.B.’s section 8, 9, and 10(b) rights under the *Charter*. The trial judge excluded the evidence under section 24(2) of the *Charter* on the basis that the gun would not have been discovered by the police if they had not violated L.B. privacy rights and that the administration of justice would be brought into disrepute if the Court admitted the evidence.

²⁶ *R. v. Clayton*, *supra* note 7 at para. 31.

On appeal, finding that there was no detention prior to the discovery of the gun, Moldaver J.A. held that the police did not breach any of L.B.'s *Charter* rights, stating that it follows that the gun should have been admitted into evidence. He referred to *R. v. Mann*²⁷ where Iacobucci J. stated that "the police cannot be said to 'detain', within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview".²⁸

Moldaver J.A. also notes that "[t]he law has not yet reached a point that a compulsion to comply will be inferred whenever a police officer requests information, for that would mean police could never ask questions."²⁹ He then balances the *Charter* rights of the accused against the serious impact of excluding the gun evidence on the administration of justice. As a result, the Crown's appeal was allowed, the acquittal was set aside and a new trial was directed.

These cases are important because they show a move away, by our appellate courts, from the exclusion of gun evidence even where there has been a *Charter* breach. *R. v. Clayton* shows that the Supreme Court has shifted its view of *Charter* cases involving police powers. Moldaver J.A. articulates the most important point in *R. v. L.B.* as follows:³⁰

[79] . . . in considering whether excluding the gun would have a more serious impact on the repute of the administration of justice than admitting it, special note must be

²⁷ [2004] 3 S.C.R. 59. www.ontariocourts.on.ca/decisions/2007/september/2007ONCA0596.htm para. 51-52

²⁸ *R. v. L.B.*, *supra* note 7 at para. 51-52 and 56 quoting *R. v. Mann*, *ibid.* at para. 19.

²⁹ *ibid.* at para. 51-52. www.ontariocourts.on.ca/decisions/2007/september/2007ONCA0596.htm

³⁰ www.ontariocourts.on.ca/decisions/2007/september/2007ONCA0596.htm paras. 79-82

made of the very serious offence for which the respondent was charged.

[80] This case involves a loaded handgun in the possession of a student on school property. Conduct of that nature is unacceptable without exception. It is something that Canadians will not tolerate. It conjures up images of horror and anguish the likes of which few could have imagined twenty-five years ago when the *Charter* first came to being. Sadly, in recent times, such images have become all too common - children left dead and dying; families overcome by grief and sorrow; communities left reeling in shock and disbelief.

[81] That is the backdrop of this case and in my view, it provides the context within which the conduct of the police should be measured, for purposes of s. 24(2) [of the *Charter*] in deciding whether we should be excluding completely reliable evidence (here, the gun) and freeing potentially dangerous people without a trial on the merits.

[82] Viewed that way, I believe that absent egregious conduct on the part of the police, most Canadians would find it unconscionable for L.B. to be set free without a trial on the merits. By egregious conduct, I have in mind conduct that the community simply would not countenance, even if this meant allowing a potentially violent criminal to escape punishment. Without being specific, it would involve conduct that showed disdain for the rights and freedoms guaranteed by the *Charter* and that struck at the core values those rights and freedoms were meant to protect. No such conduct (or anything close to it) exists in this case. It follows, in my view, that the gun should have been admitted into evidence under s. 24(2).

Canada (Attorney General) v. Hislop (SCC March 1, 2007)

In *Hislop*, the Supreme Court addressed a long-running legal battle over same-sex survivor benefits that involved an interesting legal issue about retroactive remedies of legislation declared constitutionally invalid. In this national class proceeding, class members argued that the government violated the *Charter* by refusing to pay them retroactive survivor benefits under the Canada Pension Plan following the death of their same-sex partners. The class was led by five representative plaintiffs from across Canada, including George Hislop ("Hislop"), a well-known gay rights advocate from Toronto who began his fight to win CPP survivor benefits after his partner of 28 years, Ron Shearer, died in 1986. Hislop passed away in October 2006 at age 78,

before the decision was rendered.

This case was part of the aftermath of *M. v. H.*³¹, in which the Supreme Court struck down the opposite-sex definition of spouse in the *Family Law Act*³² as being contrary to section 15(1) of the *Charter*. However, the declaration of invalidity was suspended for six months to give the government time to review the decision. Following *M. v. H.*, Parliament amended 68 federal acts, to address the same-sex issue. In 2000, the legislation governing CPP was amended to give homosexual couples the same pension rights as heterosexual couples, but those changes limited the payments to those whose partners died after January 1, 1998. Counsel for the federal government argued that granting up to 20 years of retroactive payments could cost the CPP up to \$80 million, and feared that it would open the floodgates to even more costly claims under other social programs.

The class members included over 1,000 homosexual men and women, whose same sex partners died in the period between April 17, 1985 and January 1, 1998 and, whose deceased partners contributed to the CPP ("Class Members"). Despite their partners' contributions, the class members had been denied their survivor's pensions by the federal government.

In 2003, the Ontario Superior Court struck down the legislation, ruling that the time restriction was unreasonable and arbitrary. The Class Members' success at trial

³¹ [1999] 2 S.C.R. 3.

³² R.S.O. 1990, c. F.3.

resulted in the largest class action judgment in Canadian history. The Ontario Court of Appeal agreed that the 1998 cut-off could not pass the *Charter* test while at the same time upholding another section of the law that limited claimants to retroactive benefits of no more than 12 months.

The Class Members challenged two main parts of the CPP amendments, namely, (1) restricted eligibility for survivors' benefits to same-sex partners who died on or after January 1, 1998; and (2) monthly pension benefits to a surviving same-sex spouse but limited the commencement of these payments to July 2000, when the amendments came into force.

The Supreme Court accepted the Class Members' argument that any surviving partner of a same-sex relationship should be eligible to apply for CPP survivorship benefits where the other partner died after section 15(1) of the *Charter* became effective. The Court further held that surviving same-sex partners were not entitled to receive retroactive benefits from the time of death of the same-sex partner.

LeBel and Rothstein J.J., writing for themselves and four other judges, with Bastarache J. in a concurring judgment, found that as a general rule, a declaration of constitutional invalidity involves nullification from the outset and that the applicable remedy also applies retroactively. LeBel and Rothstein J.J. noted further that it does automatically follow that a remedy retroactive to the date that the constitutionally invalid act or statute was first passed is always the most appropriate remedy. Some

factors that are considered in determining whether the legislation response can be prospective include whether:

- there has been a significant change in the law through judicial intervention;
- there has been good faith reliance by governments on a prior law;
- fairness to the litigants; and
- constitutional role of the legislature in the allocation of public resources.

The Supreme Court interpreted and relied upon its decision in *Egan v. Canada*³³, where a majority had upheld the exclusion of same-sex partners from old age security legislation, in finding that Parliament could craft a response that was prospective in nature. The Court found that in asking for payment of arrears as far back as 1985, the Class Members were effectively asking the Court to overlook the evolution of the law concerning same-sex rights and to declare that the understanding of the law today was the same as in 1985.

As a practical result of the decision, living Class Members were entitled to their survivor pensions from CPP on an ongoing basis and arrears to at least as far back as December 2000. If Class Members had received funds under the interim arrangement that was reached in July 2005, they were still entitled to retain that money and will continue to receive their monthly survivor's pension as long as they live. All Class Members are entitled to be paid their Survivor's Pension on an ongoing basis and arrears back to December 2000, 11 months prior to the filing of the lawsuit,

³³ [1995] 2 S.C.R. 513.

regardless of whether they had applied for their Survivor's pension to date.

This decision sends a message to *Charter* litigants that even if they are successful in having a statute struck down as an infringement of a *Charter*-protected right, courts may not require legislatures to retroactively compensate those who were negatively affected by the unconstitutional legislation. At the same time, the decision was a victory for some of those who were asserting rights long denied.

Charkaoui v. Canada (Citizenship and Immigration) (SCC February 23, 2007)

In *Charkaoui*³⁴, the Supreme Court unanimously struck down key provisions of the *Immigration and Refugee Protection Act*³⁵ ("IRPA") relating to controversial immigration security certificates as being grossly unfair to terrorism suspects. This case marked the first time since September 11, 2001 that the Supreme Court has challenged Parliament in its anti-terrorism efforts.³⁶

The appellants in this case were all living in Canada when they were arrested and detained. The named appellant, Adil Charkaoui, is a permanent resident, while the other two, Harkat and Almrei, are foreign nationals, who had been recognized as refugees under the *Convention for the Protection of Human Rights and Fundamental Freedoms*.³⁷ At the time of the appeal decisions, each had been detained for at least three years and the detentions were based on allegations that they constituted a

³⁴ www.canlii.org/en/ca/scc/doc/2007/2007scc9/2007scc9.html

³⁵ S.C. 2001, c. 27.

³⁶ James Stribopoulos, "Charkaoui: Beyond Anti-Terrorism: Procedural Fairness and Section 7 of the Charter", February 24, 2007, www.thecourt.ca.

³⁷ 213 U.N.T.S. 221, arts. 5, 14. This is also known as "The European Convention on Human Rights". It is available online at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>

threat to the security of Canada by reason of involvement in terrorist activities.

During their detentions, all three appellants unsuccessfully challenged the *IRPA*'s certificate scheme and detention review process. The appellants argued that the *IRPA*'s certificate scheme under which detentions were ordered is unconstitutional because it violates unwritten constitutional principles, as well as sections 7, 9, 10(c), 12 and 15 of the *Charter*.³⁸

The *IRPA* had allowed the Minister of Public Safety and Emergency Preparedness to issue a security certificate declaring that a foreign national or permanent resident is inadmissible to Canada on grounds of security. These certificates allowed for the detention of individuals without any disclosure of the evidence against them upon which it was concluded that they were a danger to the public.

The Supreme Court held that section 7 of the *Charter* was infringed by both the detention procedures and the procedure for determining whether a certificate is reasonable. The Court concluded that the basic effect in the *IRPA* security certificate regime was that a person subject to such a certificate was prevented from knowing the case he or she had to meet, and that there were alternative procedures reasonably available which would have better protected the right to liberty of a detained person without compromising the state's interest in national security.

³⁸ *Charkaoui, supra* 11 note at paras. 10-11.

The Court reasoned that although the *IRPA* allows for a hearing, and meets the requirements of independence and impartiality, the secrecy required by these provisions denies the person named in the certificate the opportunity to know the case against him or her, and with that knowledge, to be able to challenge the government's case.

The Court held that this infringement was not saved by section 1 of the *Charter*. Specifically, the Court noted that in other situations where there was sensitive national security information, provisions had been made for the use of special counsel, who were granted access to the case against their clients and permitted to cross-examine government officials seeking to detain or deport a person on the basis of such information. Therefore, while the Court found that the protection of Canada's security and related intelligence sources constitutes a pressing and substantial objective under section 1 of the *Charter*, the existence of less drastic alternatives (i.e. special counsel procedure) meant that the security certificate scheme did not minimally impair the rights of persons named in security certificates.

The *Charter's* guarantee against arbitrary detention was also found to be infringed in the case of foreign nationals where there is no review of detention until 120 days after the reasonableness of the certificate has been judicially confirmed. This infringement was also not saved under section 1 of the *Charter*.

As a result of the Court's conclusion that the *IRPA's* procedure for the judicial

approval of certificates is inconsistent with the *Charter* and should be of no force or effect, Parliament was given a one year grace period in which to develop an acceptable substitute to these controversial security certificates. The Court did not change the provisions themselves but rather, directed Parliament to draft any future law in a way that must allow defendants to know the case against them and receive disclosure so that they and counsel are able to mount a meaningful defence.

It will be interesting to see how Parliament uses this year to draft legislation that, hopefully, will do a better job of balancing our individual rights as Canadians, with our collective rights to feel and be safe in a post 9/11 world.

Pecore v. Pecore and Madsen Estate v. Saylor (SCC May 3, 2007)

On May 3, 2007 the Supreme Court of Canada released its decisions in *Pecore v. Pecore* and *Madsen Estate v. Saylor*, both of which addressed the applicability of the presumptions of advancement and resulting trust in the context of wealth transfers by aging parents. The typical situation is that the aging parent and one of the children have a joint bank account in which the parent's funds are deposited. The funds are used to meet the expenses of the aging parent but the financial management is done by the child. Sometimes, payments are made to the child. The vexing question is whether such a joint bank creates a presumption that the parent intended to gift the funds in the account to the child, i.e. the joint signatory, and if so when.

This is the situation the Supreme Court addressed in *Pecore*. An aging father

gratuitously placed the bulk of his assets in joint accounts with his daughter, Paula, who was the closest to him of his three adult children. Paula worked at various low paying jobs and took care of her quadriplegic husband. Paula's father helped her family financially, buying them a van, making improvements to their home and assisting her son while he was attending university.

Paula's father alone deposited funds into the joint accounts and continued to use and control the accounts, declaring and paying all the taxes on the income made from the assets in the accounts. In his will, he left specific bequests to Paula and her husband and to Paula's children but he did not mention the accounts. The residue of the estate was to be divided equally between Paula and her husband. After her father died, Paula redeemed the balance in the joint accounts on the basis of a right of survivorship and claimed that she alone was the owner of the funds. Her position was that the presumption of advancement applied.

When Paula and her husband divorced, a dispute arose over the ownership of the accounts. The husband claimed that Paula held the accounts in trust for the benefit of her father's estate and therefore, the assets formed part of the residue and should be distributed according to the will, i.e., the husband would receive a share. The trial judge held that the father intended to gift the accounts to Paula. The presumption of advancement was not rebutted and she was the owner of the funds and they did not form part of the estate. The Court of Appeal dismissed the appeal on the basis that the father intended to make a gift.

This is an example of the policy role of the Supreme Court. The Court determined that the trial judge, whose decision was affirmed on appeal, applied the wrong presumption. However, the error did not affect the disposition of the appeal because the trial judge found that the evidence clearly demonstrated the intention on the part of the father that the balance left in the joint accounts was to go to Paula alone on his death through survivorship. This strong finding regarding the father's actual intention shows that the trial judge's conclusion would have been the same even if he had applied the presumption of a resulting trust.³⁹

The Supreme Court (other than Abella J.) held that:⁴⁰

1. In the context of a transfer to a child, the presumption of advancement, which applies equally to fathers and mothers, is limited in its application to gratuitous transfers made by parents to minor children.
2. Given that a principal justification for the presumption of advancement is parental obligation to support dependent children, the presumption does not apply in respect of independent adult children.
3. Moreover, since it is common nowadays for aging parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs, there should be a rebuttable

³⁹ www.canlii.org/en/ca/scc/doc/2007/2007scc17/2007scc17.html, para. 75

⁴⁰ www.canlii.org/en/ca/scc/doc/2007/2007scc17/2007scc17.html at paras. 33, 36, 40, 41, 48, 50, 53, 55, 59, 62, 69

presumption that the adult child is holding the property in trust for the aging parent to facilitate the free and efficient management of that parent's affairs.

4. The presumption of advancement is also not applicable to dependent adult children because it would be impossible to list the wide variety of the circumstances that make someone "dependent" for the purpose of applying the presumption.
5. Courts would have to determine on a case by case basis whether or not a particular individual is "dependent", creating uncertainty and unpredictability in almost every instance. While dependency will not be a basis on which to apply the presumption, evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust.
6. With joint accounts, the rights of survivorship, both legal and equitable, vest when the account is opened. The gift of those rights is therefore *inter vivos* in nature. Since the nature of a joint account is that the balance will fluctuate over time, the gift in these circumstances is the transferee's survivorship interest in the account balance at the time of the transferor's death. The presumption of a resulting trust in that context means that it will fall to the surviving joint account holder to prove that the transferor intended to gift the assets are left in the account to the survivor.

7. The types of evidence that should be considered in ascertaining a transferor's intent will depend on the facts of each case. The evidence considered by a court may include the wording used in bank documents, the control and use of the funds in the account, the granting of a power of attorney, the tax treatment of the joint account, and evidence subsequent to the transfer if such evidence is relevant to the transferor's intention at the time of the transfer. The weight to be placed on a particular piece of evidence in determining intent should be left to the discretion of the trial judge.

Abella J. concurred in the result but not in the holding by the rest of the Court that the presumption of advancement was applicable only to minor children by noting that "[t]he natural affection parents are presumed to have for their adult children when both were younger should not be deemed to atrophy with age " and "the intention to have an adult child manage a parent's financial affairs during his or her lifetime is hardly inconsistent with the intention to make a gift of money in a joint account to that child. If children assist them with their affairs, this cannot logically be a reason for displacing the assumption that parents desire to benefit them."⁴¹

In the companion appeal, *Madsen Estate*, Patricia Brooks, an adult daughter was made a joint account holder, which had a right of survivorship, by her father following her mother's death. Patricia's father also executed a power of attorney in favour and she

⁴¹ www.canlii.org/en/ca/scc/doc/2007/2007scc17/2007scc17.html at paras. 79, 89, 100, 102, 107

remained the named alternate executor under his will. Patricia's father retained control of the bank accounts, paid all taxes on income made from the accounts and the funds were used solely for his benefit during his life. After his death Patricia did not include the accounts in the distribution of the estate, half of which was to be shared equally by all the siblings.

Patricia's siblings commenced proceedings against her as executor for not including the accounts in the distribution of the estate. The Supreme Court held that a presumption of a resulting trust applies to the gratuitous transfer of assets by Patricia's father into the joint accounts and not a presumption of advancement because Patricia was not a minor child of her father.

Patricia had the burden of rebutting the presumption of a resulting trust by showing that her father intended to gift the assets in the accounts to her on the balance of probabilities. The Supreme Court held that Patricia was unable to rebut the presumption and therefore the appeal was dismissed.

In *Pecore*, the Supreme Court enumerated the following as types of evidence, the trial judge deciding the weight to be placed on any particular piece of evidence, which may be considered in ascertaining a transferor's intent: ⁴²

- 1) the wording used in bank documents;
- 2) the control and use of the funds in the account;

⁴² *Ibid.* paras. 55, 59-62 and 69.

- 3) the granting of a power of attorney;
- 4) the tax treatment of the joints account;
- 5) evidence subsequent to the transfer if relevant to the transferor's position;
- 6) intention at the time of the transfer.

By defining and clarifying the differences of these two presumptions in *Pecore* and *Madsen Estate*, the Supreme Court has set out a framework for solicitors when preparing documentation for their aging clients or their children.

Boston College's Center on Wealth and Philanthropy estimates that, in the United States alone, baby boomers and their parents will transfer wealth and other assets worth at least US\$41 trillion dollars to family members and charities between now and 2053.⁴³ To extrapolate these figures to Canada, one may assume that just under \$4 trillion in assets will be transferred.

A survey conducted by Ipsos Reid revealed that only 54% of Canadians have a will that describes how they want their possessions distributed and that 47% say they have never had a detailed discussion with family about their final wishes and how they want them handled. The conclusion is that many of our clients have not considered how to deal with their assets. This is fertile ground for lawyers to serve their clients and potential clients in ways that will undoubtedly be appreciated.

⁴³ "Recipe for a Family Feud: Survey Says Almost Half of Canadians Have No Will and Haven't Discussed Their Final Wishes: Greatest Generational Wealth Transfer in History Could Also Be the Messiest" , Article in Lawyers.com for Canada online at www.lexisnexis.ca/clientdevelopment/press_room_details.php?wnid=599 (Nov. 10, 2005)

These decisions demonstrate that:

- (1) Clear evidence is required to rebut the presumption of resulting trust. Your clients probably don't know this but they will appreciate your guidance.
- (2) The adult child who is looking after an aging parent is doing so out of love and care but may also be thinking about what will happen to the funds left in the joint account when the parent dies. This is particularly so where there are siblings who are not getting along or have become estranged, or as in *Pecore*, where there is a marriage breakdown.⁴⁴ Your advice as to how an adult child can rebut the presumption of resulting trust may avoid litigation and heartache.
- (3) Raising these issues with clients will give rise to others, including the preparation or review of a will; the preparation of powers of attorney for property and for personal care with regard to the Substitute Decisions Act.⁴⁵

Two Other Significant Cases

Although the Supreme Court heard fewer cases this year than last, it was still difficult to narrow our list to only five. Here we mention two other cases which may affect our law practices.

⁴⁴ Under the Family Law Act, R.S.O. 1990, c. F.3, s.4(2), item 1, property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage is excluded from equalization of net family property.

⁴⁵ Substitute Decisions Act, 1992, S.O. 1992, c.30 (Property ss. 7-12), Personal Care ss.46-53

*Blank v. Canada (Minister of Justice) (SCC September 8, 2006)*⁴⁶

This case marked the first time that the Supreme Court considered “litigation privilege” as distinct from “solicitor-client privilege” and commented on the differences between them, most notably defining the scope of litigation privilege. Given that we live in a time where privacy issues are at the forefront of our daily lives but where full disclosure of personal affairs is still an essential part of the litigation process, this seems like an appropriate and timely commentary for the Court to make.

The Respondent Sheldon Blank had been charged along with a company of which he was a Director for thirteen regulatory offences for alleged breaches of the *Fisheries Act*⁴⁷ and regulations. The charges were quashed, some in 1997 and some in 2001, and the Crown laid new charges by way of indictment but stayed them prior to trial. Blank and the company sued the federal government for damages in fraud, conspiracy, perjury and abuse of federal prosecutorial powers.

In this civil action, Blank requested all records pertaining to the prosecutions of himself and the company, but only obtained partial disclosure. When additional disclosure was requested in the penal proceedings and under the *Access to Information Act*⁴⁸ (“*AIA*”), the government withheld certain documents on the basis of solicitor-client privilege, which is an exemption in s. 23 of the *AIA*. Blank then filed a complaint with the Information Commissioner, but the majority of the documents

⁴⁶ [2006] 2 S.C.R. 319, (McLachlin C.J. and Bastarache, Binne, LeBel, Deschamps, Abella and Rothstein JJ.) Available online at www.canlii.org/en/Ca/scc/doc/2006/2006scc39/2006scc39.html

⁴⁷ R.S., 1985, c. F-14.

⁴⁸ R.S., 1985, c. A-1.

were found to be properly exempted from disclosure.

Blank persevered and filed an application for review as per s. 41 of the *AIA*, which resulted in a decision that documents excluded from disclosure pursuant to the litigation privilege should be released if the litigation to which the record relates has ended. At the Federal Court of Appeal, the court divided with the majority finding that the litigation privilege, unlike the legal advice privilege, ended with the litigation that gave rise to the privilege, subject to the possibility that the Court left open in which “litigation” could be defined “more broadly”.

In his analysis, Fish J. wrote on behalf of himself and four others with two others concurring, that litigation privilege ends when the litigation ends. Fish J. looked at several academic sources and cases in exploring and explaining the difference between the two classes of privilege.⁴⁹ The Court defined the general exception to litigation privilege as follows:

The litigation privilege would not in any event protect from disclosure evidence of the claimant party’s abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one’s own misconduct can never be exposed to the light of day.

Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.⁵⁰

⁴⁹ *Blank*, *supra* Note 46 at paras. 23-33. See www.canlii.org/en/ca/scc/doc/2006/2006scc39/2006scc39.html

⁵⁰ *Ibid.* at paras. 44-45.

The result of the finding in *Blank* was that the government was required to make disclosure of documents over which only litigation privilege had been claimed. Given this rare commentary from the courts, it seems more likely now that challenges to privilege claims for documents in litigation files may increase, and that lawyers now have to understand this distinction in advising their clients and in deciding what documents to disclose and for what reasons.

*Dickie v. Dickie (SCC February 9, 2007)*⁵¹

One of the Supreme Court of Canada's shortest decisions may have a far-reaching impact in family cases.

Dr. Dickie was a plastic surgeon who had been married to Leaka Dickie, a registered nurse. Mrs. Dickie stopped working for about 15 years after their first child was born. Upon their separation, the Dickies agreed that spousal support payment would be payable until 2001. Thereafter, Mrs. Dickie was still in need and succeeded in obtaining an interim order for \$2,500 monthly and child support of \$9,000 monthly.

Dr. Dickie refused to pay and moved to the Bahamas with his new wife and their two children, where he was beyond the reach of Canadian law. In 2002, Greer J. ordered Dr. Dickie to provide a \$150,000 letter of credit towards his support obligations and to pay \$100,000 into court towards his ex-wife's legal expenses. In making this Order, Greer J. noted that Dr. Dickie seemingly had no assets in Ontario

⁵¹ 1 S.C.R. 346 (McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.) Available online at <http://www.canlii.org/en/ca/scc/doc/2007/2007scc8/2007scc8.html>

and that he was living in a jurisdiction which did not have reciprocal enforcement of judgements legislation with Ontario.

In January 2004, Stewart J. found Dr. Dickie in contempt of court and sentenced him to 45 days in jail. After serving his sentence, Dr. Dickie appealed to the Ontario Court of Appeal (Laskin, Sharpe, Juriansz, JJ.A.) which held (Laskin J.A. dissenting)⁵² that Stewart J. lacked jurisdiction to find Dr. Dickie in contempt on that basis that Rule 60.11(1) of the *Rules of Civil Procedure*⁵³ prevented the contempt power from being used in respect of an order for the payment of money. Before reaching this conclusion, Juriansz J.A. (Sharpe J.A. concurring), also held that the Court lacked discretion to refuse to entertain the appeal. Typically, the Court of Appeal does not entertain appeals in family law matters where there are arrears of support.

In his dissent, Laskin, J.A.⁵⁴ concluded that the Court of Appeal had discretion to refuse to entertain Dr. Dickie's appeal and should exercise that discretion by adjourning the appeal until he complied with the outstanding orders. Second, assuming that the Court entertained the appeal, Laskin J.A. wrote that the orders of Greer J. requiring Dr. Dickie to secure his support obligations by an irrevocable letter of credit and to post security for costs were *not* orders for the payment of money under Rule 60.11(1), because neither order amounts to a fixed debt obligation requiring Dr. Dickie to pay money to the Respondent Leaka Dickie. Thus, the court can use its contempt power for a breach of these orders.

⁵² Dickie v. Dickie, Jan. 13, 2006 Ont. CA online at www.ontariocourts.on.ca/decisions/2006/january/C41501.htm

⁵³ R.R.O. 1990, Reg. 194.

⁵⁴ Dickie, *supra*. www.ontariocourts.on.ca/decisions/2006/january/C41501.htm para. 66

Mrs. Dickie appealed to the Supreme Court of Canada⁵⁵. The Court accepted Laskin J.A.'s dissent in full. The issue of the Court of Appeal's discretion to entertain the appeal when orders were outstanding was moot because the Court of Appeal had heard it but the Supreme Court expressed the view that it would have declined to exercise the jurisdiction to hear the appeal until Dr. Dickie had complied with the earlier court orders.

As to the contempt issue, the Supreme Court agreed with Laskin J.A. that Rule 60.11 did not prevent the court from finding a litigant in contempt of orders to post security for costs and to post a letter of credit on the basis that neither were orders for the payment of money in the sense contemplated by Rule 60.11(1).

The decision was seen as encouraging lower courts to use their contempt power to bring recalcitrant ex-spouses to their knees.⁵⁶

Conclusion

We hope that the light we have shed on interesting cases will be useful to readers of this paper.

⁵⁵ Dickie v. Dickie online at www.canlii.org/en/ca/scc/doc/2007/2007scc8/2007scc8.html

⁵⁶ K. Makin, "Plastic surgeon loses appeal in Supreme Court", *Globe and Mail*, Feb. 9, 2007, www.theglobeandmail.com/servlet/story/RTGAM.20070209.wscoc0209/BNSStory/National/

Appendix

Synopsis of Reference re: R. v. Steven Murray Truscott issued by the Ontario Court of Appeal on August 28, 2007

*Note: This synopsis is posted on the Court's website at
www.ontariocourts.on.ca/decisions/2007/august/2007ONCA0575synopsis.htm
The full decision (300 pages, 778 paragraphs and 19 pages of appendices) is also available
online at: www.ontariocourts.on.ca/decisions/2007/august/2007ONCA0575.htm*

Background to these Proceedings

On September 30, 1959, a judge and jury found Steven Truscott guilty of the murder of Lynne Harper and sentenced him to hang. The sentence was later commuted to life imprisonment. His attempts to appeal that conviction failed. In 1966, the federal Minister of Justice referred the conviction to the Supreme Court of Canada for its consideration ("the first Reference"). An eight-member majority of that court upheld the conviction. In 2001, Mr. Truscott made a further request to the Minister of Justice for a review of his conviction. On October 28, 2004, the Minister of Justice referred the conviction to the Court of Appeal for Ontario, having been satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in this case. The Minister directed that the court determine the matter as if it were an appeal on the issue of fresh evidence.

A panel of the Court of Appeal, composed of Chief Justice McMurtry and Justices Doherty, Weiler, Rosenberg and Moldaver, heard testimony from seventeen witnesses in June and July 2006. These witnesses included people who lived at the Clinton R.C.A.F. Station in 1959 where the appellant and Lynne Harper lived, legal counsel and police officers who were involved with the case, as well as experts in the fields of pathology, gastroenterology and entomology. Between January 31 and February 14, 2007, the court heard the oral argument of counsel for the appellant and for the Attorney General of Ontario ("the Crown").

Summary of the Decision

In a decision released today, the court unanimously holds that the conviction of Mr. Truscott was a miscarriage of justice and must be quashed. The court further holds that the appropriate remedy in this case is to enter an acquittal. The court thus orders that Mr. Truscott should stand acquitted of the murder of Lynne Harper.

In Part I of its reasons, the court provides an overview of the history of the proceedings involving the appellant. The court summarizes the four main evidentiary pillars of the Crown's case against the appellant and the salient features of the defence case.

In Part II, the court sets out the legal framework that governs its analysis and explains the nature of the two-stage analysis that it employs in deciding this Reference. The first stage of the analysis is a consideration of the material that the appellant tendered in these proceedings that the court concludes is admissible as fresh evidence on appeal pursuant to s. 683(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. The second stage of the analysis involves the determination of the appropriate remedy.

In Part III, the court conducts the first stage of its analysis. The court reviews new expert

pathology and gastroenterology evidence, as well as archival documents that relate to the credibility and reliability of the evidence of the doctor who performed the autopsy on the body of Lynne Harper. The court concludes that this material, which was not considered at trial or on the first Reference, qualifies as fresh evidence under the relevant provisions of the *Criminal Code*. This fresh evidence significantly undermines the medical evidence relied on by the Crown in the prior proceedings to establish that Lynne Harper died before 8 p.m. on June 9, 1959.

The time of Lynne Harper's death was a critical issue at trial and on the first Reference. On the Crown's theory of the case, if Lynne Harper died between 7 and 8 p.m., then the appellant must have killed her, while if she was killed some time after 8 p.m., then the appellant was not the perpetrator. The court concludes that the fresh evidence relating to the time of death, considered in the context of the entirety of the evidence, could reasonably be expected to have caused the jury to at least have a reasonable doubt that Lynne Harper died before 8 p.m. If the jury had a reasonable doubt on this factual issue, it could not have convicted the appellant. The result of the prior proceedings therefore could reasonably be expected to have been different if this fresh evidence had been available. The court's determination to admit this fresh evidence means that as a matter of law the verdict cannot stand. The conviction must be quashed as a miscarriage of justice.

In Part IV, the court explains its approach to the second stage of its analysis, the determination of the appropriate remedy. Under the governing provision of the *Criminal Code*, where a conviction is quashed on appeal, the court has three remedial options: order an acquittal, order a new trial, or order a new trial and enter a stay of that new trial. Counsel for the appellant asked the court to enter an acquittal based on the factual merits of the case at it now stands and to declare that the appellant is innocent of Lynne Harper's murder. The Crown submitted that the court should enter an acquittal only if it is satisfied on the totality of the evidence that no reasonable jury could convict. If the totality of the evidence could reasonably support a conviction, the Crown submitted that the court should order a new trial.

The court is not satisfied that the appellant has been able to demonstrate his factual innocence. The court is also not satisfied that an acquittal would be the only reasonable verdict of a new trial. In most cases, this conclusion would lead the court to order a new trial. However, the court concludes that ordering a new trial would not be an adequate remedy given the unusual features of this case, which include: a new trial would be a practical impossibility at this time; the appellant and his family have lived under the burden of this miscarriage of justice for almost fifty years; and this court is the first judicial body to have before it a substantial amount of material that could have assisted the appellant's counsel in making full answer and defence on his behalf at trial and on the first Reference.

In these unique circumstances, the court approaches the appropriate remedy by envisioning how a hypothetical new trial of the appellant would proceed in light of the entirety of the new information now before the court. The court proceeds on the basis that the appellant should be entitled to an acquittal if it concludes, based on all of the new information now available, that it is clearly more probable than not that the appellant would be acquitted at a hypothetical new trial. The court is satisfied that the appellant has met that standard.

In Part V, the court provides a detailed analysis of what a hypothetical new trial of the appellant would look like. In so doing, the court examines the evidentiary record from the

prior proceedings, the fresh evidence admitted on this Reference and a mass of other material, none of which was previously judicially considered.

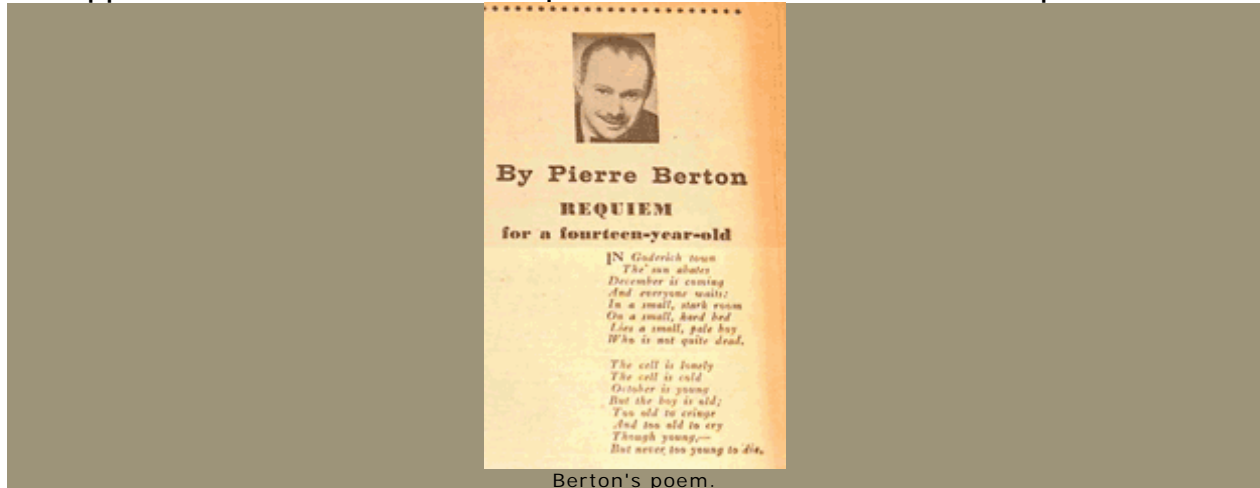
The court's analysis of the likely outcome of a hypothetical new trial proceeds as follows:

- Section A summarizes the new material offered by the appellant that the court concludes would not affect the Crown's case.
- Section B examines the impact of the new material offered by the appellant on the four main evidentiary pillars upon which the Crown's case rested at trial.
- Section C considers how the new material could be used to strengthen the case for the defence.
- Section D discusses how the crime scene evidence, which is not changed by the new information, could be relied on by the defence in attempting to raise a reasonable doubt.
- Section E examines what is left of the Crown's case against the appellant.

In Part VI, the court concludes by summarizing the effect of the fresh evidence and the new material placed before it that was not previously considered in a judicial forum: see paras. 776-787. The court outlines how this material weakens the four evidentiary pillars of the Crown's case, as well as how it enhances the reliability of the defence evidence. Finally, in the words of s. 696.3(3)(ii) of the *Criminal Code*, the court allows Mr. Truscott's appeal, sets aside the conviction against him and enters an acquittal.

August 28, 2007

Appendix – Found online at <http://www.cbc.ca/fifth/truscott/poem.html>



Berton's poem.

REQUIEM FOR A FOURTEEN-YEAR-OLD

By: Pierre Berton

In Goderich town
The Sun abates
December is coming
And everyone waits:
In a small, dark room
On a small, hard bed
Lies a small, pale boy
Who is not quite dead.

The cell is lonely
The cell is cold
October is young
But the boy is old;
Too old to cringe
And too old to cry
Though young --
But never too young to die.

It's true enough
That we cannot brag
Of a national anthem
Or a national flag
And though our Vision
Is still in doubt
At last we've something to boast
about:
We've a national law
In the name of the Queen
To hang a child
Who is just fourteen.

The law is clear:
It says we must
And in this country
The law is just
Sing heigh! Sing ho!
For justice blind
Makes no distinction
Of any kind;
Makes no allowances for sex or
years,
A judge's feelings, a mother's tears;
Makes no allowances for age or

youth
Just eye for eye and tooth for tooth
Tooth for tooth and eye for eye:
A child does murder
A child must die.

Don't fret ... don't worry ...
No need to cry
We'll only pretend he's going to die;
We're going to reprieve him
Bye and bye.

We're going to reprieve him
(We always do),
But it wouldn't be fair
If we told him, too
So we'll keep the secret
As long as we can
And hope that he'll take it
Like a man.

And when we've told him
It's just "pretend"
And he won't be strung
At a noose's end,
We'll send him away
And, like as not
Put him in prison
And let him rot.

The jury said "mercy"
And we agree --
O, merciful jury:
You and me.

Oh death can come
And death can go
Some deaths are sudden
And some are slow;
In a small cold cell
In October mild
Death comes each day
To a frightened child.

So muffle the drums and beat them
slow,
Mute the strings and play them low,
Sing a lament and sing it well,
But not for the boy in the cold, dark
cell,
Not for the parents, trembling-
lipped,
Not for the judge who followed the
script;
Save your prayers for the righteous
ghouls
In that Higher Court who write the
rules
For judge and jury and hangman
too:
The Court composed of me and
you.

In Goderich town
The trees turn red
The limbs go bare
As their leave are bled
And the days tick by
As the sky turns lead
For the small, scared boy
On the small, stark bed
A fourteen-year-old
Who is not quite dead.