SCC File No.: 40371

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUÉBEC COURT OF APPEAL)

BETWEEN:

CANADIAN BROADCASTING CORPORATION, LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉPENDANTE (CN2I), CANADIAN PRESS ENTERPRISES INC., MEDIAQMI INC., GROUPE TVA INC.

APPELLANTS
(Applicants)

-and-

HIS MAJESTY THE KING and NAMED PERSON

RESPONDENTS
(Respondents)

-and-

LUCIE RONDEAU, in her capacity as Chief Justice of the Court of Quebec

INTERVENER
(Applicant)

(Style of cause continued on following page)

BOOK OF AUTHORITIES OF THE INTERVENER, ATTORNEY GENERAL OF ALBERTA
(Pursuant to Rules 44 of the *Rules of the Supreme Court of Canada*)

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INTERVENERS

AND BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

APPELLANT
(Applicant)

-and-

NAMED PERSON and HIS MAJESTY THE KING

RESPONDENTS
(Respondents)

-and-

CANADIAN BROADCASTING CORPORATION
LA PRESSE INC., COOPÉRATIVE NATIONALE DE L'INFORMATION INDÉPENDANTE (CN2i), LA PRESSE CANADIENNE, and LUCIE RONDEAU, in her capacity as Chief Justice of the Court of Quebec

INTERVENERS
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TO: THE REGISTRAR

AND TO:

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TABLE OF CONTENTS

[HOUSE OF LORDS.]

SCOTT (OTHERWISE MORGAN) AND ANOTHER . . APPELLANTS ; H. L. (E.)*

AND

SCOTT . . . . . RESPONDENT.

1913

May 5.

Divorce—Practice—Nullity—Hearing in Camera—Publication of Proceedings after Decree—Contempt of Court—Committal—Appeal—Competency—Criminal Cause or Matter—Matrimonial Causes Act, 1857 (20 & 21 *Vict.* c. 85), *ss.* 2, 6, 22, 46—*Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), *s.* 47.

The Probate, Divorce and Admiralty Division has no power, either with or without the consent of the parties, to hear a nullity suit or other matrimonial suit in camera in the interest of public decency.

Barnett v. *Barnett* (1859) 29 L. J. (P. & M.) 28, and *H.* (*falsely called C.*) v. *C.* (1859) 29 L. J. (P. & M.) 29 ; 1 Sw. & Tr. 605, followed and approved.

A. v. *A.* (1875) L. R. 3 P. & M. 230, overruled.

D. v. *D.* [1903] P. 144, considered.

Per Viscount Haldane L.C. : The general rule as to publicity must yield to the paramount duty of the Court to secure that justice is done ; and it is open to a party in a matrimonial suit, upon proof that justice cannot be done otherwise, to apply for a hearing in camera, and even for the prohibition of subsequent publication of the proceedings, in exceptional cases.

Per Earl Loreburn : In cases where it is shewn that the administration of justice would be rendered impracticable by the presence of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the Court, an order for hearing a matrimonial suit in camera may be lawfully made. Subject to the above limitations rules may be made under the Matrimonial Causes Act, 1857, to regulate the hearing of causes in camera.

An order was made at the instance of the petitioner in a nullity suit, which was practically undefended, for the hearing of the cause in camera. After a decree nisi had been pronounced the petitioner, through her solicitor, obtained a transcript of the official shorthand writer's notes of the proceedings at the hearing of the cause and sent copies of this transcript to certain persons in defence of her reputation.

Upon a motion by the respondent to commit for contempt of Court the petitioner and her solicitor for publishing copies of this transcript, in contravention of the order directing that the cause should be heard in camera, Bargrave Deane J. found that the petitioner and her solicitor were guilty of a contempt of Court and ordered them to pay

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* *Present:* VISCOUNT HALDANE L.C., EARL OF HALSBURY, EARL LOREBURN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

H. L. (E.)
1913
SCOTT
v.
SCOTT.

the costs of the motion, and an appeal from this order was dismissed as incompetent:—

Held, (1.) that the order to hear in camera was made without jurisdiction; (2.) that the order, assuming that there was jurisdiction to make it, did not prevent the subsequent publication of the proceedings; (3.) that the order to pay costs was not a judgment in a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, so that no appeal would lie from it.

Decision of the Court of Appeal [1912] P. 241, reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Bargrave Deane J. (2)

On January 12, 1911, the appellant Annie Maria Scott, otherwise Annie Maria Morgan, filed a petition in the Probate, Divorce and Admiralty Division asking that the ceremony of marriage celebrated on July 8, 1899, at St. Mary's Church, Ealing, between herself and the respondent might be declared null and void by reason of the respondent's impotence.

The appellant Percy Braby acted as the petitioner's solicitor in this suit.

On February 14, 1911, an order was made in the cause by the registrar, on a summons issued by the petitioner, appointing medical inspectors for the examination of the parties and ordering "that this cause be heard in camera."

The petitioner attended for medical inspection in pursuance of this order and was reported to be a virgin. The respondent did not attend for inspection. The respondent had filed an answer denying that he was impotent, but the answer was by leave withdrawn.

On June 13, 1911, the cause was heard before the President in camera and a decree nisi was pronounced, the cause being undefended. On January 15, 1912, the decree nisi was made absolute. In August, 1911, the petitioner instructed her solicitor, the appellant Braby, to obtain for her from the Court a transcript of the proceedings at the hearing of the cause, and, at her instance, the solicitor had three copies made of this transcript. One copy the petitioner sent to Mr. Graham Scott, the respondent's father, the second she sent to Mrs. Westenra, a sister of the respondent, and the third to another person.

(1) [1912] P. 241. (2) [1912] P. 4.

On November 23, 1911, the respondent issued a notice of motion, intituled in the cause only, asking that the appellants might be committed to prison for their contempt of Court in circulating or otherwise publishing a copy of the transcript of the official shorthand writer's notes of the proceedings at the hearing of the cause "in contravention of an order dated the 14th day of February, 1911, directing that this cause be heard in camera."

The notice of motion further asked that the appellants might be restrained from making any similar or other communications either directly or indirectly concerning the subject-matter of the cause, and from otherwise molesting the respondent, his relatives and friends, doctors and patients and others; and that they might be directed to state on oath the names and addresses of the persons to whom similar communications had been made. The notice of motion was also addressed to Mr. Waller, Mr. Braby's partner, but at the hearing it was admitted that he had no part in the matter.

The petitioner, in an affidavit in opposition to the motion, stated that she sent the copies of the transcript to the three persons aboved named in consequence of reports issued by the respondent reflecting on her sanity and in defence of her reputation, and tendered an apology to the Court if it should be held that she had contravened the order of February 14, 1911.

On December 4, 1911, the motion was heard before Bargrave Deane J., who found that the appellants had been guilty of contempt of Court and ordered them to pay the costs of the motion.

The appellants appealed, and upon the appeal the preliminary objection was taken by the respondent that the appeal was incompetent on the ground that the order appealed from was made in a criminal cause or matter within s. 47 of the Judicature Act, 1873.

The appeal was originally argued before Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ., but it was ultimately ordered to be re-argued before the Full Court of Appeal.

The Court (Cozens-Hardy M.R., Farwell, Buckley, and Kennedy L.JJ. (Vaughan Williams and Fletcher Moulton L.JJ.

H. L. (E.) 1913

SCOTT v. SCOTT.

dissenting)) upheld the objection and dismissed the appeal as incompetent.

Having regard to the public importance of the questions involved in this appeal and to the probability that the respondent might not be represented by counsel, the Treasury, acting on the advice of the Attorney-General, provided counsel to argue the case from the respondent's point of view.

1913. March 3, 4, 7, 11. *Sir R. Finlay, K.C.*, and *Barnard, K.C.* (with them *W. O. Willis*), for the appellants. 1. The order of Bargrave Deane J., directing the appellants to pay the costs of the motion to commit, was not a judgment in a criminal cause or matter within s. 47 of the Judicature Act, 1873, so that no appeal lay from it. The form of the notice of motion shews that the respondent was really applying for civil relief. It is not intituled in the manner universally adopted in quasi-criminal proceedings, namely, in the suit and in the matter of an application to commit the respondents to the motion for contempt of Court, and, in addition to committal, it asks for an injunction and discovery. The motion was a mere step in the civil proceedings and was not a criminal matter at all.

The exception to the right of appeal in s. 47 is confined to causes or matters relating to crimes which are indictable or criminal offences which are punishable summarily. Mere disobedience to an order of the Court, though it may result in imprisonment, does not fall within the section : *Attorney-General* v. *Bradlaugh* (1); *Reg.* v. *Barnardo* (2); *O'Shea* v. *O'Shea and Parnell* (3); *In re Evans.* (4) [Upon this point they also referred to *Cox* v. *Hakes* (5); *Reg.* v. *Fletcher* (6); *Reg.* v. *Steel* (7); *Witt* v. *Corcoran* (8); *Stevens* v. *Metropolitan District Ry. Co.* (9); *Bristow* v. *Smyth* (10); *Mellor* v. *Denham* (11);

(1) 1885) 14 Q. B. D. 667, at p. 687.
(2) (1889) 23 Q. B. D. 305, at pp. 308, 309.
(3) (1890) 15 P. D. 59, at pp. 63, 64.
(4) [1893] 1 Ch. 252.
(5) (1890) 15 App. Cas. 506.
(6) (1876) 2 Q. B. D. 43.
(7) (1876) 2 Q. B. D. 37.
(8) (1876) 2 Ch. D. 69.
(9) (1885) 29 Ch. D. 60.
(10) (1885) 2 Times L. R. 36.
(11) (1880) 5 Q. B. D. 467.

Reg. v. *Whitchurch* (1); *Reg.* v. *Foote* (2); *In re Dudley* (3); *In re Hardwick* (4); *In re Preston* (5); *Seldon* v. *Wilde* (6); *Harvey* v. *Harvey* (7); *Helmore* v. *Smith* (8); *In re Johnson* (9); *Crowther* v. *Elgood* (10); *Preston* v. *Etherington* (11); *In re Wray* (12); *Reg.* v. *Jordan* (13); *Ex parte Woodhall* (14); *Hunt* v. *Clarke* (15); *Rex* v. *Tibbits* (16); *In re Ashwin* (17); *In re Eede* (18); *Ex parte Pulbrook* (19); *In re Armstrong* (20); *Attorney-General* v. *Kissane* (21); *Seaman* v. *Burley* (22); *Southwark and Vauxhall Water Co.* v. *Hampton Urban District Council* (23); *In re Edgcome* (24); *Robson* v. *Biggar* (25); *Ex parte Fernandez* (26); *Cobbett* v. *Slowman* (27); *Stark* v. *Stark*. (28)]

2. An order in a nullity suit for hearing in camera, assuming that there is jurisdiction to make it, does not prevent the subsequent publication of the proceeedings. The order of Bargrave Deane J. goes far beyond any jurisdiction ever claimed or exercised by the Ecclesiastical Courts, yet the respondent bases his case upon the practice of the Ecclesiastical Courts, which is preserved by s. 22 of the Matrimonial Causes Act, 1857, in suits which were formerly within the jurisdiction of those Courts. Take the case of an innocent man summoned to answer scandalous charges of such a nature that it is necessary that the case should be heard in camera. A bald statement of the dismissal of the action would not clear his character. Can it be said that there is a duty cast upon him not to divulge the evidence given at the hearing for the purpose of vindicating his conduct? Of course

(1) (1881) 7 Q. B. D. 534.
(2) (1883) 10 Q. B. D. 378.
(3) (1883) 12 Q. B. D. 44.
(4) (1883) 12 Q. B. D. 148.
(5) (1883) 11 Q. B. D. 545.
(6) [1911] 1 K. B. 701.
(7) (1884) 26 Ch. D. 644.
(8) (1886) 35 Ch. D. 449.
(9) (1887) 20 Q. B. D. 68.
(10) (1887) 34 Ch. D. 691.
(11) (1887) 36 W. R. 49.
(12) (1887) 36 Ch. D. 138.
(13) (1888) 36 W. R. 797.
(14) (1888) 20 Q. B. D. 832.
(15) (1889) 58 L. J. (Q.B.) 490.
(16) [1902] 1 K. B. 77.
(17) (1890) 25 Q. B. D. 271.
(18) (1890) 25 Q. B. D. 228.
(19) [1892] 1 Q. B. 86.
(20) [1892] 1 Q. B. 327.
(21) (1893) 32 L. R. Ir. 220.
(22) [1896] 2 Q. B. 344.
(23) [1899] 1 Q. B. 273.
(24) [1902] 2 K. B. 403.
(25) [1908] 1 K. B. 672.
(26) (1861) 10 C. B. (N.S.) 3; 30 L. J. (C.P.) 321.
(27) (1850) 4 Ex. 747; (1854) 9 Ex. 633.
(28) [1910] P. 190.

H. L. (E.) 1913 SCOTT v. SCOTT.

a malicious disclosure of the evidence would be restrained; but any abuse of this right of publication could be effectively dealt with by the ordinary law. If the proprietor of a newspaper published the evidence of a nullity suit which had been heard in camera he would be criminally liable for an obscene libel. In *Lawrence* v. *Ambery* (1), which is the only previous case in which this point has arisen, Sir Francis Jeune appears to have expressed an opinion that there could be no disclosure of what had been heard in camera, but that dictum was obiter only, and the motion for attachment was dismissed. The effect of the practice of the Ecclesiastical Courts, as summed up in the judgment of Fletcher Moulton L.J., is that an order for hearing in camera related only to the mode of conducting the hearing and had no reference to subsequent publication, and that the Court never assumed power in matrimonial cases to enjoin perpetual silence upon the parties or others. *Rex* v. *Clement* (2), upon which Farwell L.J. relied, really supports the appellants' contention. There several persons charged with high treason by the same indictment severed in their challenges and were consequently tried seriatim. Abbott C.J. having stated publicly that he thought it necessary to prohibit any publication of the proceedings until they were completely terminated, it was held that the proprietor of a newspaper who had published an account of the trial of two of the prisoners whilst the others remained to be tried was properly found guilty of a contempt of Court; but the basis of the decision was that the trial of all the prisoners constituted one entire proceeding. Subsequent publication may be prohibited in cases relating to trade secrets and to wards of Court and lunatics, but those cases depend upon different principles and have no bearing on the present case.

3. The Court had no jurisdiction to make the order for hearing in camera. In the Court below the Master of the Rolls relied upon the view expressed by Sir Francis Jeune in *D.* v. *D.* (3) that the Court possessed an inherent jurisdiction to hear any case in private where it was necessary for the due administration of justice. But the rule of English law is that all cases must be

(1) (1891) 91 L. T. Jo. 230. (2) (1821) 4 B. & Ald. 218.
(3) [1903] P. 144.

heard in open Court subject to certain specified classes of exceptions. This is stated explicitly by Jessel M.R. in *Nagle-Gillman* v. *Christopher* (1), where he lays it down that the High Court has no power to hear cases in private, even with the consent of the parties, except (1.) in cases affecting lunatics and wards of Court or (2.) where a public trial would defeat the whole object of the action or (3.) where the practice of the old Ecclesiastical Courts in this respect is continued. The appellants submit that the last exception is not well founded, but they rely upon the general proposition of law there stated. The first exception depends upon the quasi-paternal jurisdiction which the Court, acting as the representative of the King as parens patriæ, exercises for the protection of the lunatic or ward of Court. Accordingly, in the case of a ward of Court, it has been held that the Court, without the consent of the parties, may make an order for hearing in private—*Ogle* v. *Brandling* (2)—and may treat as a contempt of Court the subsequent publication of the proceedings: *In re Martindale.* (3) The second exception relates primarily to cases of trade secrets, and in such cases also it may be necessary to prohibit disclosure after the trial in order to prevent the destruction of the property the subject-matter of the action: *Andrew* v. *Raeburn* (4); *Mellor* v. *Thompson* (5); *Badische Anilin und Soda Fabrik* v. *Levinstein.* (6) In *Malan* v. *Young* (7), the Sherborne School libel action, Denman J., with the consent of the parties, made an order for hearing in camera, notwithstanding the protest of a barrister, but during the progress of the trial the learned judge stated that considerable doubt existed amongst the judges as to his jurisdiction to make the order and invited the parties to elect whether they would take the risk of proceeding with the case in camera or would begin de novo in open Court; and in the result the case was heard in private before the judge as arbitrator. That case therefore is not an authority in support of the inherent jurisdiction of the Court to hear cases in camera.

(1) (1876) 4 Ch. D. 173; 46 L. J. (Ch.) 60.
(2) (1831) 2 Russ. & My. 688.
(3) [1894] 3 Ch. 193.
(4) (1874) L. R. 9 Ch. 522.
(5) (1885) 31 Ch. D. 55.
(6) (1883) 24 Ch. D. 156.
(7) (1889) 6 Times L. R. 38.

H. L. (E.) 1913 SCOTT v. SCOTT.

[EARL OF HALSBURY referred to *Lord Portsmouth's Case.* (1)]

With regard to the third exception, s. 22 of the Matrimonial Causes Act, 1857, provides that in all suits other than a suit for dissolution, that is to say, in all suits which could have been entertained by the old Ecclesiastical Courts, the Court is to act upon the principles of the Ecclesiastical Courts, but subject to the provisions of the Act and the rules and orders thereunder. The proviso is important. Sect. 46 provides that, subject to any rules and regulations made under the Act, the witnesses are to be examined orally in open Court. Sect. 53 empowers the Court to make rules and regulations concerning the procedure under the Act, and by s. 67 these rules and regulations are to be laid before Parliament. The effect of these sections taken together is that all suits in the Divorce Court are to be heard in open Court, subject to any rules and regulations which may be made to the contrary. The only rule which relates to the mode of hearing is r. 205 of the Divorce Rules and Regulations, but that rule gives no authority to the Court to hear cases in camera. Therefore, if there ever was any power in the Ecclesiastical Courts to order proceedings in nullity suits to be heard in camera, that power has been taken away by the terms of the Act. The appellants admit that a practice supposed to be based upon the practice of the Ecclesiastical Courts has sprung up by which suits for nullity have been heard in camera, but it is submitted that there is no justification for that practice. In *Barnett* v. *Barnett* (2), which was decided very shortly after the passing of the Matrimonial Causes Act, 1857, Sir Cresswell Cresswell held that the Act did not confer upon the Court any power to order a matrimonial suit to be heard in camera. That was a suit for judicial separation, which could have been entertained by the Ecclesiastical Courts; and as regards the practice of the Ecclesiastical Courts there is no ground for distinguishing between a suit for nullity and any other suit which those Courts could have entertained—divorce a mensa et thoro, restitution, jactitation. That case was followed in the same year by *H. (falsely called C.)* v. *C.* (3), which was a nullity

(1) (1815) G. Coop. Ch. Ca. 106.
(2) 29 L. J. (P. & M.) 28.
(3) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.

suit, where the Full Court (Sir Cresswell Cresswell, Williams J., and Bramwell B.) held that the Divorce Court had no power to sit otherwise than with open doors. In *C.* v. *C.* (1) Lord Penzance held that he had no power to hear a suit for dissolution in camera, although he expressed the opinion obiter that nullity suits might be heard in private by virtue of s. 22 of the Matrimonial Causes Act, 1857. In *A.* v. *A.* (2) Sir James Hannen held that he had power, even without the consent of the parties, to hear a suit for restitution of conjugal rights in private, and he based his decision upon the practice of the Ecclesiastical Courts. In *D.* v. *D.* (3), where there were consolidated suits, namely, a suit by the wife for judicial separation and a suit by the husband for dissolution of marriage, Sir Francis Jeune, with the consent of the parties, ordered the suits to be heard in camera, and his judgment proceeded partly on the ground of the inherent jurisdiction of the Court, and partly on the ground that the Court had inherited the powers and practice of the Ecclesiastical Courts. Those cases are inconsistent with *H.* (*falsely called C.*) v. *C.* (4) and ought to be overruled. Further, it is a mistake to suppose that it ever was the practice of the Ecclesiastical Courts to hear nullity suits or any other matrimonial suits in private. Under that practice the witnesses on each side were examined in private, and in the absence of the parties, before an examiner, and the mode of cross-examination was by interrogatories previously delivered to the examiner by the adverse party, but after the publication of the depositions all causes were heard publicly in open Court: Shelford on Marriage and Divorce, pp. 520, 522, 524, 530. And see Conset's Ecclesiastical Practice, 3rd ed., p. 158, and Blackstone's Commentaries, 11th ed., vol. 3, pp. 448—450. Until 1843 nullity suits were reported with the full names of the parties, and until 1864 there never was any hearing of nullity suits in private. (5) The modern practice is founded upon a misapprehension of the powers of the Ecclesiastical Courts.

4. Assuming that the order of Bargrave Deane J. was within

(1) (1869) L. R. 1 P. & M. 640.
(2) L. R. 3 P. & M. 230.
(3) [1903] P. 144.
(4) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.
(5) See reporter's note to *A.* v. *A.*, 3 P. & M. at p. 232.

H. L. (E.) 1913 SCOTT v. SCOTT.

his jurisdiction, the publication was privileged, and the appellants ought not to have been ordered to pay the costs of the motion: *In re Pollard.* (1)

Sir John Simon, S.-G., and *Danckwerts, K.C.* (with them *Bayford*), for the respondent 1. As to the question of jurisdiction, the appellants' contention with regard to the practice of the Ecclesiastical Courts is clearly wrong. In a note to *Briggs* v. *Morgan* (2) reference is made to a nullity suit (August 1, 1821) the medical evidence in which was heard "in camera." That reference shews not only that the evidence was taken in private, but that the presentation to the Court was also in private. In *Deane* v. *Aveling* (reported on hearing 1 Rob. Eccl. 279) on May 13, 1845, an application was made by letter for the hearing of a nullity suit in private (3), and the letter assumes that the matter was within the discretion of the judge. It does not appear whether the application was granted. Those cases are sufficient to shew that the Ecclesiastical Courts had the power to hear nullity suits in private, although that power was not universally exercised; and the existence of this power is recognized by the text-writers: Cockburn's Clerk's Assistant in the Practice of the Ecclesiastical Courts, c. 14, s. 10; Swabey's Law of Divorce and Matrimonial Causes, 2nd ed., p. 97. This was also the view of a number of very eminent judges,—Jessel M.R., Lord Penzance, Lord Hannen, and Lord St. Helier. As regards the getting in of the evidence, it was the invariable practice of the Ecclesiastical Courts to examine the witnesses in secret: *Herbert* v. *Herbert* (4), which is the foundation for the passage in Shelford on Marriage

(1) (1868) L. R. 2 P. C. 106.

(2) (1820) 2 Hagg. Cons. at p. 332.

(3) The following is a copy of this letter:—

"Doctors Commons,
"13th May, 1845.

"Dear Sir,

"*Deane agst. Aveling.*

"As this is a case of nullity of marriage by reason of malformation to avoid unnecessary publicity of the disclosures in the evidence we shall feel obliged by your intimating our wishes to the judge that *if he shall be so pleased* it may be heard in private.

"We are, Dear Sir,
"Yours faithfully,
"W. Rothery.
"Edwd. W. Crosse.

"Jno. Shephard, Esq."

(See addendum at p. 487.)

(4) (1819) 2 Hagg. Cons. 263, at p. 267.

and Divorce on p. 522; Conset's Ecclesiastical Practice (1685), pt. iii., s. 3; pt. vi., s. 4. When the evidence was complete publication was decreed, which meant, not publication to the world, but communication to the other party to the suit: see Coote's Ecclesiastical Practice, p. 806. Then as to the hearing and judgment or sentence, it is conceded that the sentence was required to be given in open Court: Burn's Ecclesiastical Law, tit. Marriage XI. (Divorce), s. 7. That is expressly provided by canon 106 of the Canons of 1603, and canon 108 imposes penalties for the violation of this rule. The reason for that rule was obviously that it was essential that in any proceedings affecting a question of status the result should be publicly known. But there is no corresponding provision as to the hearing of the suit, and the fact that it is expressly provided that the sentence shall be in open Court lends support to the inference that no such rule existed as to the hearing. The statement in Shelford on Marriage and Divorce, p. 530, that all causes are heard publicly in open Court was conveyed without acknowledgment from the report of an Ecclesiastical Commission appointed in 1830 to inquire into the practice of the Ecclesiastical Courts, and, divorced from its context, it is misleading. The main issue to be determined by that Commission was whether the method adopted by the Common Law Courts of viva voce evidence ought not also to be adopted by the Ecclesiastical Courts, and the Commission, when, in describing the practice of the Ecclesiastical Courts, it speaks of the hearing in open Court, was using the words in connection with that issue. It was not referring to the admission or non-admission of the public, but was contrasting the method of hearing, which was before the judge in Court in the presence of the parties, with the secret examination of witnesses which it had previously described: Parliamentary Papers 1831-32, vol. 24, pp. 18, 19. Moreover the Commission was not dealing with this special class of cases, namely, nullity suits, at all. [They referred to Burn's Ecclesiastical Practice (9th ed.), vol. 3, pp. 202, 207.] Therefore the passage in Shelford is not an authority against the respondent's contention.

Assuming then that the Ecclesiastical Courts had jurisdiction to

H. L. (E.) 1913 SCOTT v. SCOTT.

hear causes in private, that power is preserved by s. 22 of the Matrimonial Causes Act, 1857. Sect. 46 is not opposed to this view. Until 1854 the Ecclesiastical Courts had no power to examine witnesses viva voce, but in that year an Act was passed (17 & 18 Vict. c. 47) conferring that power upon them. In that state of things s. 46 of the Act of 1857 says, not that the trial shall be in open Court, but that the witnesses shall be examined orally in open Court. That section is not aimed at the admission of the public to the Court, but is intended to secure that the method of taking evidence shall be by oral examination before the judge in Court as distinguished from the old method of examination in secret. But, whatever be the construction of s. 46, it is prefaced by the words "Subject to such rules and regulations as may be established as hereinafter provided" (see s. 53), and it is submitted that r. 205 of the Divorce Rules, though it contains no specific provision as to hearing in camera, is wide enough to create, if need be, the necessary exception to s. 46. As regards *H.* (*falsely called C.*) v. *C.* (1) the report contains no reference to s. 22 and the case must be read with the suspicion that that section was not before the Court. Further, Williams J., although he expresses his opinion that the Court, being a new Court, had no jurisdiction to hear cases in camera, admits that other judges had taken a different view, and he assumes that he had a discretion in the matter and declines to exercise it. Bramwell B. starts from the same point and, on the assumption that the Court is a new Court, says it has no jurisdiction to hear in private. There is, however, a stream of authority subsequent to that case shewing that the Court has such a jurisdiction. In *C.* v. *C.* (2) Lord Penzance says in terms that the Ecclesiastical Courts did hear nullity suits in private and that the Divorce Court had maintained and followed up that practice. In *A.* v. *A.* (3) Sir James Hannen puts the case higher and states that the power of the Ecclesiastical Courts was not limited to nullity suits and that the Divorce Court had the same power, and he adds that the rule laid down in *H.* (*falsely called C.*) v. *C.* (1) had not been acted upon. In

(1) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.
(2) L. R. 1 P. & M. 640.
(3) L. R. 3 P. & M. 230.

Nagle-Gillman v. *Christopher* (1) Jessel M.R. states distinctly that the practice of the Ecclesiastical Courts to hear suits for nullity or judicial separation in private was preserved by s. 22 of the Matrimonial Causes Act, 1857. Finally in *D.* v. *D.* (2) Sir Francis Jeune states not only that the Divorce Court had inherited the power of the Ecclesiastical Courts to hear cases in camera, but that the Court had an inherent power to hear a suit for dissolution in camera. He bases his decision upon the general power of the Court to hear in camera any case in which justice cannot be done otherwise and suggests that in many matrimonial cases a hearing in public would bring about a denial of justice because a modest woman would refuse to assert her rights. Such a power is required in the interests of justice and to enable the Court to maintain its own efficiency and its own dignity. Both the general rule as to hearing in open Court and the exceptions thereto are explicable upon the common principle that the Court will so conduct its business as to do justice efficiently. The gravity of the consequences of insisting upon a hearing in public in matrimonial cases may be just as great as in the case of a trade secret, for in both instances the result might be to defeat the ends of justice. Putting aside the cases of wards of Court and lunatics, hearing in camera is not confined to trade secrets, but may be ordered wherever the object of the suit would be defeated. Neither *Andrew* v. *Raeburn* (3) nor *Mellor* v. *Thompson* (4) was a case of a trade secret. It is an axiom of English law that prima facie the administration of justice should be open to all the world, but that is not an absolute rule of natural justice, and the cases which have been cited are illustrations of the general power of the Court to exclude the public wherever the interests of justice require it. See *Lewis* v. *Levy*. (5) This jurisdiction existed in the Divorce Court apart from the Judicature Act, but, if necessary, the respondent prays in aid the provisions of that Act. In the Children Act, 1908, s. 114, which expressly empowers the Court to exclude the public whilst a child or young person is giving

(1) 4 Ch. D. 173; 46 L. J. (Ch.) 60.
(2) [1903] P. 144.
(3) L. R. 9 Ch. 522.
(4) 31 Ch. D. 55.
(5) (1858) E. B. & E. 537, at p. 546, per Lord Campbell.

H. L. (E.) 1913 SCOTT v. SCOTT.

evidence in any proceedings relating to an offence against decency or morality, the Legislature has been careful to preserve to the Court any power which it might have independently to hear cases in camera. [They also referred to the Summary Jurisdiction Act, 1848, s. 12.] Further, the jurisdiction of the Court to make the order for hearing in camera was not contested by the appellants in the Court of Appeal, and therefore the point is not now open to them : *Kay* v. *Marshall.* (1)

2. As to subsequent publication, the privilege of reporting what takes place in a Court of justice is based on the fact that the hearing is in public, and the publication of the proceedings is merely enlarging the area of the Court : *Macdougall* v. *Knight* (2); and see *Popham* v. *Pickburn.* (3) It follows that in cases where the public is excluded from audience the privilege of publication goes too, since the public has no right to this secondary form of audience, which stands on no higher ground than the right to attend in Court and hear. The maxim "Cessante ratione cessat lex" applies. In cases such as nullity suits the protection accorded by an order for hearing in camera ought as a matter of common sense to be extended to the subsequent publication of the proceedings : *Lawrence* v. *Ambery* (4) and see *In re Martindale.* (5)

[LORD ATKINSON referred to *M'Leod* v. *St. Aubyn.* (6)]

3. Assuming that a contempt was committed, the question whether it was a criminal contempt within s. 47 of the Judicature Act, 1873, depends upon whether the disobedience to the order was an interference with the course of justice or was merely an interference with the rights of the parties. The order for the hearing in camera was made not to secure a private right but for the efficient administration of justice, and disobedience to such an order is a misdemeanour punishable by fine and imprisonment. *Seaward* v. *Paterson* (7) illustrates the difference between

(1) (1841) 8 Cl. & F. 245.
(2) (1889) 14 App. Cas. 194, at pp. 200, 206.
(3) (1862) 31 L. J. (Ex.) 133, at p. 136.
(4) 91 L. T. Jo. 230.
(5) [1894] 3 Ch. 193, at p. 200.
(6) [1899] A. C. 549.
(7) [1897] 1 Ch. 545.

the two kinds of contempt. When once the matter is before the Court, the question whether or not a criminal contempt has been committed cannot depend upon the form of the application to commit. The Court of Appeal was therefore right in allowing the objection to the competency of the appeal. [Upon this point, in addition to the cases cited by the appellants, they referred to Russell on Crimes, 5th ed., vol. 1., p. 561; Chitty on Criminal Law, 2nd ed., vol. 2, p. 279; *Miller* v. *Knox* (1); *In re Clement* (2); *Wellesley* v. *Mornington* (3); *Reg.* v. *Rudge* (4); *Ex parte Savarkar.* (5)]

Sir R. Finlay, K.C., replied.

The House took time for consideration.

May 5. VISCOUNT HALDANE L.C. (6) My Lords, the facts in this case are not in controversy, but questions of law of considerable public importance are raised.

The appellant Mrs. Scott filed her petition against her husband, the respondent, for a declaration that their marriage was void because of his impotence. She then took out a summons asking for the appointment of medical inspectors, and that the petition should be heard in camera, and on this summons an order was made for such hearing. The petition duly came on in camera, and the appellant obtained a decree of nullity. The petition was practically undefended, and the evidence was very simple. There was nothing to differentiate the case from many others which are heard in open Court, and so far as the public were concerned it might quite well have been so heard. The decree was subsequently, on January 15, 1912, made absolute.

In August, 1911, the appellant Mrs. Scott, and the appellant Braby, who was her solicitor, sent copies of the shorthand notes of the proceedings at the hearing to Mr. Graham Scott, the father of the respondent, and to Mrs. Westenra, the respondent's sister, and also to a third person. Mrs. Scott appears to have been under the impression that an inaccurate account had been given by the respondent of the position of the parties to the case, and of what really took place.

(1) (1838) 4 Bing. N. C. 574.
(2) (1822) 11 Price, 68.
(3) (1848) 11 Beav. 181.
(4) (1886) 16 Q. B. D. 459.
(5) [1910] 2 K. B. 1056.
(6) Read by Lord Atkinson.

H. L. (E.) 1913 SCOTT v. SCOTT. Viscount Haldane L.C.

In December, 1911, the respondent moved to commit the appellants and Mr. Waller, who was the appellant Braby's partner, for contempt in so sending the copies of the shorthand notes, in breach, as was alleged, of the order for hearing in camera, and he also moved for an injunction. The motion was heard by Bargrave Deane J., who decided that the two appellants had been guilty of contempt of Court, and ordered them to pay the costs of the motion. From this order they appealed. On the hearing of the appeal a preliminary objection was taken on behalf of the respondent that no appeal lay, inasmuch as the order of Bargrave Deane J. amounted to a judgment in a criminal cause or matter within the meaning of s. 47 of the Judicature Act of 1873. The Court of Appeal, consisting of the Master of the Rolls and Fletcher Moulton and Kennedy L.JJ., ordered the appeal to be re-argued before the Full Court of Appeal. It was in consequence so re-argued, and was finally dismissed. The Master of the Rolls and Farwell, Buckley, and Kennedy L.JJ. were of opinion that the order appealed from was right, while Vaughan Williams and Fletcher Moulton L.JJ. took a different view.

My Lords, the question which we have now to decide necessitates consideration of the jurisdiction to hear in camera in nullity proceedings, and of the power of the judge to make an order which not only excludes the public from the hearing, but restrains the parties from afterwards making public the details of what took place. Without such consideration it is not possible to arrive at a satisfactory conclusion as to whether such an order as was made in this case amounted to a judgment in a criminal cause or matter within the meaning of the section of the Judicature Act to which I have referred. We, therefore, invited counsel to address us more fully as to the history and character of the jurisdiction than appears to have been done in the Courts below.

My Lords, I think it is established that the Ecclesiastical Courts in the exercise of their jurisdiction in nullity suits, prior to the Act of 1857, which established the Divorce Court, did from time to time direct the hearing to take place in camera. But in estimating the significance of this fact it is necessary to remember that the procedure of these Courts was very

different from that of the High Court of Justice. Until shortly before the Divorce Court was set up it was not their practice to take evidence viva voce in open Court. The evidence was taken in the form of depositions before commissioners, who conducted their proceedings in private. The parties were not represented at this stage in the fashion with which we are familiar. When a witness was tendered for examination the commissioners could, in the course of taking his deposition, put to him interrogatories delivered by the other side, but there was no cross-examination, or, for that matter, examination-in-chief, of the parties. Each side could tender witnesses, but until the evidence was complete neither side was allowed to see the depositions which had been taken. After the commissioners had finished their work, what was called publication took place.

This did not mean that the evidence was published to the world, but only that the parties had access to it. The next stage was that arguments were heard by the judge of the Court, and finally he gave judgment and pronounced a sentence. So much of the proceedings took place before the commissioners that the modern distinction between hearing in camera and hearing in open Court obviously had nothing approaching to the importance which it possesses to-day. As a rule the proceedings in nullity suits, subsequent to what was called publication, appear to have been conducted in open Court. But sometimes this was not so, with the exception of the final stage at which sentence was pronounced. The sentence itself appears always to have been pronounced in open Court. As regards the arguments the Court seems to have exercised a discretion as to whether the public should be admitted while they took place.

In 1857 the jurisdiction of the Ecclesiastical Courts in matrimonial proceedings was terminated by the statute of that year, and a new Court was established with the title of the Court for Divorce and Matrimonial Causes. Decrees for judicial separation were substituted for the old decrees for divorce a mensa et thoro, and a wholly new power was given to entertain petitions for dissolution of marriage. Sect. 22 provided that in all suits and proceedings, other than proceedings for dissolution, the Court should proceed and act and give relief on

H. L. (E.) 1913 SCOTT v. SCOTT. Viscount Haldane L.C.

principles and rules which in its opinion should be as nearly as might be conformable to the principles and rules on which the Ecclesiastical Courts acted, but this was to be done subject to the provisions of the statute itself, and of the rules and orders made under it. By s. 36 the Court was empowered to direct the trial to take place with a jury. By s. 46, subject to such rules and regulations as might be established, the witnesses in all proceedings before the Court were, where their attendance could be had, to be sworn and examined orally in open Court. A proviso to this section allowed the parties to verify their cases by affidavit, but subject to cross-examination on such affidavits in open Court, if the opposite party so desired. By s. 53 power was given to the Court to make rules and regulations, and by s. 67 any such rules or regulations were to be laid before Parliament.

My Lords, I think that the effect of s. 46 of the Divorce Act was substantially to put an end to the old procedure, and to enact that the new Court was to conduct its business on the general principles as regards publicity which regulated the other Courts of justice in this country. These general principles are of much public importance, and I think that the power to make rules, conferred by ss. 46 and 53, must be treated as given subject to their observance. They lay down that the administration of justice must so far as the trial of the case is concerned, with certain narrowly defined exceptions to which I will refer later on, be conducted in open Court. I think that s. 46 lays down this principle generally, and that s. 22 is, so far as publicity of hearing is concerned, to be read as making no exception in any class of suit or proceeding save in so far as ordinary Courts of justice might have power to make it. This appears to have been the view taken in the cases of *Barnett* v. *Barnett* (1) and *H.* (*falsely called C.*) v. *C.* (2), both decided in 1859, shortly after the Divorce Act had come into operation. The second case came before the Full Court, which included Bramwell B. In giving his judgment he observes that the Divorce Court "being a new Court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its

(1) 29 L. J. (P. & M.) 28.
(2) 29 L. J. (P. & M.) 29; 1 Sw. & Tr. 605.

proceedings should be conducted in public." It is not easy to see how, the provision as to the making of rules notwithstanding, a different interpretation could have been put on the statute from that put by Bramwell B., and for some time this interpretation appears to have been adhered to.

In a note to the case of *A.* v. *A.* (1), decided in 1875, the reporter observes that down to July, 1864, nullity cases were always heard in open Court, but that in the case of *Marshall* v. *Hamilton* (2) the evidence was of such a character that Sir J. Wilde signified a desire that for the future such cases should be heard in camera, and, with the consent of counsel, ordered such a hearing. In *A.* v. *A.* (1), however, Sir James Hannen held that, notwithstanding the objection of the petitioner, he could direct the hearing to take place in camera, and he relied partly on a dictum in *C.* v. *C.* (3) to the effect that the Court had power, under s. 22 of the Divorce Act, to follow the old practice, and partly on a new practice which had begun to grow up.

My Lords, I think that Sir James Hannen laid down the law much too widely, for reasons which I have already given. Whatever may have been the power of the Ecclesiastical Courts, the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private. If there is any exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limits to the individual discretion of the judge.

My Lords, it was not unnatural that the judges of the Divorce Court should have felt embarrassed by the want of the power which the old Ecclesiastical Courts possessed to hear in camera any case which for reasons of decency they thought ought to be so heard, and it is not surprising that Sir James Hannen's judgment was followed by Sir Francis Jeune in *D.* v. *D.* (4) But while that learned judge held, somewhat hesitatingly I think, that

(1) L. R. 3 P. & M. 230.
(2) (1864) 3 Sw. & Tr. 517.
(3) L. R. 1 P. & M. 640.
(4) [1903] P. 144.

H. L. (E.) 1913 SCOTT v. SCOTT. Viscount Haldane L.C.

the Divorce Court had in a suit for judicial separation inherited the power of the Ecclesiastical Courts to hear in camera, he went on to say that even in suits for dissolution this could be ordered if it was reasonably clear that justice could not be done unless the hearing was so conducted. My Lords, this second ground of decision is a very different one from the first. As to the proposition that the Divorce Court has inherited the power to hear in camera of the Ecclesiastical Courts, I am of opinion that, since the Divorce Act of 1857, it has been untrue of every class of case, and not merely of suits for divorce strictly so called. I am in accord with the reasoning of Bramwell B., in the case I have already referred to, which led him to the conclusion that the Court which the statute constituted is a new Court governed by the same principles, so far as publicity is concerned, as govern other Courts.

In cases in other Courts, where all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator. The right to invoke the assistance of a Court of Appeal may be thereby affected, but the parties are at liberty to do what they please with their private rights. In proceedings, however, which, like those in the Matrimonial Court, affect status, the public has a general interest which the parties cannot exclude, and I am unable to see how their consent can justify the taking of an exceptional course. But Sir Francis Jeune does not appear to have thought that it could. He proceeds, in the final reasons for his judgment, on the ground that justice could not be done in the particular case before him if it were not heard in camera. This, he thought, was a general principle which applied to all Courts.

My Lords, provided that the principle is applied with great care and is not stretched to cases where there is not a strict necessity for invoking it, I do not dissent from this view of the existing law. To exclude it would, in certain classes of litigation, mean a denial of justice. In *Andrew* v. *Raeburn* (1) Lord Cairns and James and Mellish L.JJ. appear to express themselves in its favour, but in carefully guarded terms. In

(1) L. R. 9 Ch. 522.

interpreting their decision I think that North J. in *In re Martindale* (1), which was cited to us, went much too far, and, while I agree generally with the judgment of Sir George Jessel M.R. in *Nagle-Gillman* v. *Christopher* (2), from what I have already said it will be evident that if its concluding sentence is meant to do more than raise a question as to the continuance of the practice of the Ecclesiastical Courts, I cannot concur in it. The case of wards of Court and lunatics stands on a different footing. There the judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge.

In order to make my meaning distinct, I will put the proposition in another form. While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly

(1) [1894] 3 Ch. 193. (2) 4 Ch. D. 173.

H. L. (E.) 1913

SCOTT v. SCOTT.

Viscount Haldane L.C.

yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity.

I think that if the principle in cases of secret process be what I have stated, it affords guidance in other cases. In *Rex* v. *Clement* (1), where under special circumstances it was held that daily publication of the evidence in a particular criminal trial in defiance of the judge had impeded justice, and was, therefore, an offence against it, we have a different illustration of a rule which may have manifold application, and may cover cases of the class before us in this appeal. But unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is contest between parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly, and bring it up to the standard which the underlying principle requires. He may be able to shew that the evidence can be effectively brought before the Court in no other fashion. He may even be able to establish that subsequent publication must be prohibited for a time or altogether. But this further conclusion he will find more difficult in a matrimonial case than in the case of the secret process, where the objection to publication is not confined to the mere difficulty of giving testimony in open Court. In either case he must satisfy the Court that by nothing short of the exclusion of the public can justice be done. The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal Court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors.

My Lords, it may well be that in proceedings in the Divorce Court, whether the proceedings be for divorce, or for declaration

(1) 4 B. & Ald. 218.

of nullity, or for judicial separation, a case may come before the judge in which it is evident that the choice must be between a hearing in public and a defeat of the ends of justice. Such cases do not occur every day. If the evidence to be given is of such a character that it would be impracticable to force an unwilling witness to give it in public, the case may come within the exception to the principle that in these proceedings, and not the less because they involve an adjudication on status as distinguished from mere private right, a public hearing must be insisted on in accordance with the rules which govern the general procedure in English Courts of justice. A mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish is not, I repeat, enough as the law now stands. I think that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made. Whether this state of the law is satisfactory is a question not for a Court of justice but for the Legislature. I observe that in the Incest Act of 1908 the principle has been altered in cases coming under that Act, and in the report of the recent Royal Commission on Divorce recommendations are made which, if Parliament gives effect to them, will materially modify the law as I conceive it to stand to-day. But it is with that law, as I have endeavoured to define it, that we are concerned in the present case.

My Lords, in my opinion the facts before Bargrave Deane J. fell short of what was requisite to justify departure from the principle which requires the hearing, in all but exceptional cases of the class I have indicated, to take place in open Court. No doubt the petitioner and the respondent preferred to give their evidence in private. But the evidence actually given was of a brief and simple character, and it might without difficulty have been tendered in open Court. In my opinion there was no valid reason for hearing the case in camera and the order was made in reality for the benefit of the parties who concurred in asking for it, and was therefore made under a mistaken impression as to the law. And if that be the substance of the matter it disposes of the appeal. The order was wrong, and it could not effect the

H. L. (E.) 1913 SCOTT v. SCOTT. Viscount Haldane L.C.

abrogation of the prima facie right, excluded only in exceptional cases such as I have already spoken of, which the parties and the public possess to make known what takes place at the hearing and to discuss it.

Even if the order had been validly made by reason of the consent of the parties, it could have provided nothing more than an instrument for enforcing an agreement come to as to the mode in which the hearing should take place. A breach of the order would, therefore, have in substance been punishable only on the same footing as a breach of an ordinary order in a civil case for an injunction; and a punitive order made with reference to the breach falls, in such cases, outside the language of s. 47 of the Judicature Act of 1873, which provides that no appeal shall lie from a judgment of the High Court in any criminal cause or matter. If the principle which governs the jurisdiction of the Divorce Court to hear in camera is that which I have sought to explain, this conclusion is the only one which is consistent with the section and the decisions which interpret it.

I am, therefore, of opinion that the judgment of the Court of Appeal should be reversed and the order of Bargrave Deane J. discharged, and that the respondent should pay the costs here and in the Courts below. I move accordingly.

EARL OF HALSBURY. My Lords, the facts out of which this question arises have been sufficiently explained by the Lord Chancellor, and I will not waste time by repeating them; but the case raises such important issues of law that I am unwilling that there should appear to be any doubt about them.

I am of opinion that every Court of justice is open to every subject of the King. I will deal presently with what have been called exceptions to that rule, though I think it is a mistake as to some of the so-called exceptions thus to describe them, but I want in the first instance to emphasize the broad rule I believe to be the law.

I believe this has been the rule, at all events, for some centuries, but, as I will attempt to shew presently, it has been the unquestioned rule since 1857, unquestioned by anything that I can recognize as an authority. My Lords, if this were

merely an antiquarian investigation I might point to the treatise of Mr. Emlyn in 1730, as a preface to the second edition of the State Trials, in six volumes folio. "In other countries," Mr. Emlyn says (at p. iv.), "the Courts of justice are held in secret; with us publicly and in open view."

He is there speaking of criminal trials, but he certainly has no good word to say of the Ecclesiastical Courts of his time, and if he could have added that they claimed a right to sit in secret he certainly would not have omitted to do so.

Mr. Daines Barrington, writing in 1766, and suggesting that the Courts were not open as of right in the time of Edward I., even in England (1), says "In the modern sense of an open Court the Legislature could never have allowed any fees to be taken for admittance." "I do not recollect," he adds, "to have met in any of the European laws with any injunction that all Courts should be held ostiis apertis, except in those of the republic of Lucca." At all events Mr. Daines Barrington and Mr. Emlyn (both learned lawyers) were under the impression that the law of England required in their days that Courts should be open; this may be a matter for legal research, but the law as it now stands requires no such investigation. It has been settled by statute, and the exception supposed to have been introduced as to the Ecclesiastical Courts under the statute is, I think, completely disposed of by the learned exposition of the practice of those Courts by Lord Moulton in his judgment in the Court of Appeal and the instructive judgment of the noble lord, Lord Shaw, which I have had the privilege of reading.

There are three different exceptions commonly so called, though in my judgment two of them are no exceptions at all. The first is wardship and the relation between guardian and ward, and the second is the care and treatment of lunatics.

My Lords, neither of these, for a reason that hardly requires

(1) [Observations on Statutes, ed. 1796, p. 144. Barrington's comment is on the Statute of Westminster the Second, cc. 42, 44, which he seems to have misunderstood. The excessive fees there in question were taken from parties, not from the public, and "pro ingressu *vel egressu*." But Barrington wanted to air his own opinion that the idle spectators who crowded the Courts might well be kept down by a moderate fee for admission.—F. P.]

H. L. (E.) 1913 SCOTT v. SCOTT. Earl of Halsbury.

to be stated, forms part of the public administration of justice at all.

Again, the acceptance of the aid of a judge as arbitrator to deal with private family disputes has, by the express nature of it, no relation to the public administration of justice, and it will be observed how careful Lord Eldon was when intervening in such a case (*In the Matter of Lord Portsmouth* (1)) to point out that it was only by consent of the parties on both sides that he consented so to hear it, and in the Sherborne School case, *Malan* v. *Young* (2), it was clearly recognized that it was only heard in private when a regular agreement of the parties that it should be so heard was entered into.

My Lords, while I agree with the Lord Chancellor in the result which he has arrived at in this case, and generally in the principles he has laid down, I wish to guard myself against the proposition that a judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret. I do not deny it, because it is impossible to prove what cases might or might not be brought within that category, but I should require to have brought before me the concrete case before I could express an opinion upon it. Your Lordship has said that a mere desire to consider feelings of delicacy or to exclude from public hearing details which it would not be desirable to publish is not, in your Lordship's opinion, enough to prevent a public hearing, which must be insisted on in accordance with the rule which governs the general procedure in English Courts of justice, and that to justify an order for hearing in camera it must be shewn that the paramount object of securing that justice is done would really be rendered doubtful of attainment.

The difficulty I have in accepting this as a sufficient exposition of the law is that the words in which your Lordship has laid down the rule are of such wide application that individual judges may apply them in a way that, in my opinion, the law does not warrant.

I am not venturing to criticize your Lordship's language, which, as your Lordship understands it, and as I venture to say

(1) G. Coop. Cas. in Ch. 106. (2) 6 Times L. R. 38.

I myself understand it, is probably enough to secure the observance of the rule of public hearing, but what I venture to point out is that it is not so definite in its application but that an individual judge might think that, in his view, the paramount object could not be attained without a secret hearing. Although I am very far from saying that such a case may not arise, I hesitate to accede to the width of the language, which, as I say, might be applied to what, in my view, would be an unlawful extension.

I confess I am amazed to find three such learned judges as Sir Cresswell Cresswell, Williams J., and Bramwell B. (in *H.* (*falsely called C.*) v. *C.* (1)) overruled by any single judge, and especially when it is remembered that this was a judgment given after consultation upon this very point—after consultation with the Judge Ordinary—and determining that "the Court had no power to sit otherwise than with open doors."

My Lords, from that judgment there was no appeal, and I should have thought until it was brought before this House it would have been accepted as the law, but considering that Lord St. Helier's decision (*D.* v. *D.* (2)) has never been challenged, I do not wonder that the order was made apparently as a matter of course in this case.

My Lords, as to the injunction of perpetual secrecy, there is not a judgment of authority to justify it. The supposed analogy of trade secrets or private correspondence is no analogy at all.

In the one case the trade secret is being protected as a species of property, and, indeed, the other is in the same category. In either it might be protected by injunction, and it would be the height of absurdity as well as of injustice to allow a trial at law to protect either to be made the instrument of destroying the very thing it was intended to protect. I cannot agree with the Court of Appeal that this is a criminal case in the sense in which these words are used in the Judicature Act, and I think they ought to have heard the appeal, and I entirely agree to the motion which the Lord Chancellor has proposed.

EARL LOREBURN. My Lords, I concur in holding that the Court of Appeal had jurisdiction to entertain this case. The test

(1) 1 Sw. & Tr. 605. (2) [1903] P. 144.

H. L. (E.) 1913 SCOTT v. SCOTT. Earl Loreburn

of their jurisdiction under s. 47 of the Judicature Act is not whether criminal proceedings could (if they could) have been taken for disobedience to the order, but whether the cause or matter in which the order was made was in point of fact a criminal cause or matter. I can see nothing here except the penal enforcement of a direction for hearing in camera obtained at the request of Mrs. Scott, and for her protection, in a petition for nullity, and interpreted by the learned judge to be equivalent to an order for perpetual silence. If that is a criminal matter, then an action for assault is so also (for a man may be indicted for assault), a position which no one has ever attempted to maintain. I further think that, even assuming Bargrave Deane J. had full power to direct a hearing in camera and to treat it as an order for perpetual silence, he was wrong in treating as a contempt of Court the publication by Mrs. Scott in good faith of the true evidence in justifiable defence of her own reputation and happiness. If this be so, then the Court of Appeal ought to have heard and reversed Bargrave Deane J.'s decision, and in the circumstances of this case we ought to end the litigation by making the order which they should have made, though in ordinary circumstances, I apprehend, the case would be remitted to the Court of Appeal.

Here I would prefer to take leave of this litigation altogether, for the function of a Court is simply to do justice between the parties who come before it. But, in view of the far-reaching statements of law which are to be found in some of the judgments in the Courts below, I feel constrained to say something, as little as possible.

In the argument here and below, or in the judgments, a number of most important questions were raised. In what circumstances can a judge direct a case to be heard with closed doors? When a case has been so heard, has any one, and if so, who and to whom, and in what circumstances, a right to repeat what was said in the secrecy of the trial? What were the powers and what the practice of the old Ecclesiastical Courts in this respect, and has the present Divorce Court inherited those powers? When is contempt of Court criminal and when merely civil, so as to admit of an appeal to the Court of Appeal? Is

there any power, and over whom, to prohibit repetition of what happens in chambers as well as of what happens in a closed Court? It would require a treatise to expound the law upon all these subjects, and it would be a treatise without authority, liable to the risk of error or misconception which inevitably attends judicial efforts to declare the law at large and in general terms outside of the points really raised by the facts of the case, instead of following the method by which the common law of this country has been gradually built up into a coherent though irregular structure. I will advert only to the points raised by the facts here.

I cannot think that the High Court has an unqualified power in its discretion to hear civil proceedings with closed doors. The inveterate rule is that justice shall be administered in open Court. I do not speak of the parental jurisdiction regarding lunatics or wards of Court, or of what may be done in chambers, which is a distinct and by no means short subject, or of special statutory restrictions. I speak of the trial of actions including petitions for divorce or nullity in the High Court. To this rule of publicity there are exceptions, and we must see whether any principle can be deduced from the cases in which the exception has been allowed.

It has been held that when the subject-matter of the action would be destroyed by a hearing in open Court, as in a case of some secret process of manufacture, the doors may be closed. I think this may be justified upon wider ground. Farwell L.J. aptly cites Lord Eldon as saying, in a case of quite a different kind, that he dispensed with the presence of some of the parties "in order to do all that can be done for the purposes of justice rather than hold that no justice shall subsist among persons who may have entered into these contracts." An aggrieved person, entitled to protection against one man who had stolen his secret, would not ask for it on the terms that the secret was to be communicated to all the world. There would be in effect a denial of justice.

Again, the Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the

H. L. (E.) 1913 SCOTT v. SCOTT. Earl Loreburn.

exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general. Or witnesses may be ordered to withdraw, lest they trim their evidence by hearing the evidence of others. Or, to use the language of Fletcher Moulton L.J., in very exceptional cases, such as *D.* v. *D.* (1), where a judge finds that a portion of the trial is rendered impracticable by the presence of the public, he may exclude them so far as to enable the trial to proceed. It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.

Applying this principle to proceedings for nullity, if the Court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress, or interfere with the effective trial of the cause, in my opinion an order for hearing or partial hearing in camera may lawfully be made. But I cannot think that it may be made as a matter of course, though my own view is that the power ought to be liberally exercised, because justice will be frustrated or declined if the Court is made a place of moral torture. Very learned judges of the Divorce Court have acted upon the view that they possess peculiarly extensive powers in this respect, inherited from the old Ecclesiastical Courts. I do not think so. The 46th section of the Matrimonial Causes Act, 1857, requires evidence to be given in open Court, an expression so clear that I was surprised to hear its meaning contested, and this provision overrides the old practice of secret hearing in the Ecclesiastical Courts. I do not, however, read s. 46 of the Matrimonial Causes Act, 1857, as prohibiting a trial in camera where such considerations may require it as in other Courts equally bound to sit in public. That section almost invites the framing of rules under the Act to regulate hearings otherwise than in open Court. Such rules would, in my opinion, be valid if they did not go beyond the

(1) [1903] P. 144.

limitations indicated. But no rules to that effect have been made, and the Divorce Court is bound by the general rule of publicity applicable to the High Court and subject to the same exception. I incline to the opinion that the High Court also may make such rules, but this was not argued.

In this connection there remains one other matter upon which comment is necessary. Some passages in various judgments in this and other cases indicate that the Court has a right to close its doors in the interest of public decency. Apart from some Act of Parliament authorizing such a course in particular cases, I regret that I cannot find warrant for this opinion. However true it may be that the publicity given to obscene or bestial matter by trial in open Court stimulates and suggests imitation, as many judges have learned from experience at assizes, and however deplorable it may be that they have no power to prevent it, the remedy must be found by the Legislature or not at all. It is a great evil. And though the traditional law, that English justice must be administered openly in the face of all men, is an almost priceless inheritance, it does seem strange that it may be relaxed in order to save property, but cannot be relaxed in order to safeguard public decency against even the foulest contamination. I feel certain that considerations of this kind have influenced judges, especially in the Divorce Court, and I wish that I could agree with their view of the law.

Another main question raised by the judgments under review is, what power has the High Court to prevent or punish disclosure of what has taken place in camera after the hearing is over? It is almost an uncharted sea. Until this case hardly any direct authority can be cited. Yet nothing can be more clear than that an order for a hearing in camera of a trial involving a secret process might be utterly illusory if the evidence could be published afterwards with impunity. There must be some power to prevent that, or the undoubted assertion by the very highest authorities of a right to close the Court in such cases would be reduced to an idle mockery. I think that after such an order has been made no one has a right to be present on terms of defying the order. It is not a bargain to maintain secrecy. It is a duty to obey the order for secrecy so far as the order lawfully

H. L. (E.) 1913 SCOTT v. SCOTT. Earl Loreburn.

goes. The authority of the Court to treat disobedience in this matter as a contempt rests on the same basis as its authority to treat as a contempt the wilful intrusion of a witness after an order has been made that all witnesses shall leave the Court. But what is the degree and duration of secrecy which the Court can impose?

Confining myself for the moment simply to cases of secret process, it seems to me that the limitations of the jurisdiction to impose silence or secrecy must be commensurate with the purpose for which the jurisdiction exists. That purpose is to keep the Court available for the enforcement of rights or the redress of wrongs, and it would not be so available if it could be made a vehicle for publishing the secret after the hearing is over. I think we are driven to say that there is jurisdiction to treat as a contempt of Court any wilful and malicious publication of such a kind as that, if it were known to be allowed, ordinary sensible people would not come to the Court at all.

This conclusion appears to me the inevitable corollary once you admit that a case of trade secret can be heard in camera. And I think it is equally an inevitable corollary in any other class of case so heard. In nullity and in divorce cases it may be that justice would be frustrated as much by the terror of publicity after trial as by publicity at the hearing. But to say that all subsequent publication can be forbidden and every one can be ordained to keep perpetual silence as to what passed at the trial is far in excess of the jurisdiction, and is indeed an unwarrantable interference with the rights of the subject. It is not that a Court ought to refrain from exercising its power in such a way. It is that the Court does not possess such a power. The jurisdiction must surely be limited to wilful and malicious publications going beyond the necessity. To take the present case as an illustration. The right of this lady to tell the truth and to furnish the best evidence of the truth in defence of her own character and reputation is inalienable, and cannot lawfully be taken away by any judge. It is but an elementary right, though if the claim of right be merely put forward as a pretext to cover some malicious communication it could not prevail. There is no more difficulty in deciding whether a particular case comes

within this line or lies outside it than in deciding whether there has been express malice in uttering defamatory matter on an occasion of privilege. If the communication be made in good faith and in fulfilment of any social or moral duty to oneself or any one else, it cannot be either prohibited or punished.

I have felt very strongly in this case the duty so admirably expressed by Fletcher Moulton L.J., that Courts of justice, who are the guardians of public liberties, ought to be doubly vigilant against encroachments by themselves. But when a Court has to decide either that there shall be no justice available for people suffering under wrong or that malicious publication shall be prevented, I believe that the second is the right alternative, and that so to hold is merely to apply a principle acted upon by high authorities and indispensable in itself. There does, indeed, remain a danger that a Court may not be so jealous to do right when its proceedings are not subject to full public criticism. I acknowledge that this is always possible, and it is not an adequate answer to say that the judges can be trusted, though I believe entirely that they can be trusted. It comes to a choice between the administration of justice in some cases without the safeguard, on the one hand, and on the other hand no administration of justice in such cases at all. That is not to be considered here as a matter of policy but as a matter of law, and in my interpretation of it the law is in principle what I have endeavoured to state.

LORD ATKINSON. My Lords, I concur. The argument in this case has ranged over a very wide field: many topics have been discussed, principles of vast importance have been laid down, principles which in their application might, I think, involve a serious encroachment on the liberty of the subject, but the fundamental proposition upon which the respondent's case in the ultimate result rests is, in my view, this, that an order to hear a cause in camera enjoins perpetual silence upon everybody as to what transpired at the hearing, except perhaps the result of it. If this proposition be unsound then the respondent's whole case collapses like a house of cards; neither the petitioner nor her solicitor have been guilty of any contempt of Court, nor disobeyed any order of Court, nor committed any crime, and the order

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

of Bargrave Deane J. was not, and could not have been, made in any criminal cause or matter. In my view the proposition is unsustained by authority and is in itself unsound. Two arguments, and in reality only two, have been urged before your Lordships in support of it. The first is I think based on a false analogy, and the second involves a fallacy. Cases such as *Badische Anilin und Soda Fabrik* v. *Levinstein* (1), *Andrew* v. *Raeburn* (2), and *Mellor* v. *Thompson* (3) were cited, and it was sought to apply the principles on which they were decided to suits brought to have a marriage annulled on the ground of the impotence of one of the parties. But the first of these suits was wholly different in character and nature from a nullity suit; there is no similarity whatever between them. In it a secret process was involved. The whole value of the property in the process in most, if not all, of such cases depends on the details of the process being kept secret. If the secret be disclosed the value of the property vanishes. It would be manifestly unjust to allow a disclosure of a secret, made during the hearing of such a suit in camera, either under the compulsion of the presiding judge or at his invitation, in order to enable him to decide the points at issue, to be made use of at any time thereafter to destroy the value of the property.

Perpetual silence as to what transpired at the hearing of such a case in camera may become absolutely essential in order to avoid the perpetration of this wrong; otherwise the whole object of a suit brought to protect property might be defeated by the form of procedure adopted by the tribunal from which the relief desired was sought to be obtained.

Andrew v. *Raeburn* (2) was a suit for an injunction to restrain the publication of certain letters which passed between one or other of the plaintiffs in the suit and a third party. The application with which Lord Cairns dealt in the judgment so much relied upon was an application to hear the appeal in camera. The application was refused on the ground that the case was not one "which would cause an entire destruction of the matter in dispute."

(1) 24 Ch. D. 156. (2) L. R. 9 Ch. 522.
(3) 31 Ch. D. 55

Lord Cairns, in giving judgment, said: "If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute, I should have taken time to consider whether it was consistent with the practice of the Court to hear it in private, even without the consent of both parties, in order to prevent an entire destruction of the matter in dispute. But from the nature of the case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing." This is the very principle upon which the cases dealing with secret processes were decided. *Mellor* v. *Thompson* (1) is to the same effect. Nullity suits are not instituted to protect property. The publication of the evidence taken in camera in such a suit even after the cause has ended may, no doubt, cause pain, but it cannot render property valueless or cause the destruction of the whole matter of dispute. The relief prayed for will have been granted or refused, the issues in the suit decided, subsequent publication of the evidence could not have an effect at all resembling that mentioned in these cases respectively.

Even, therefore, if it should be held to be the law that in the former class of suits all persons should, for the special reasons indicated, be enjoined to perpetual silence touching everything disclosed during a hearing in camera, it would, in my view, be quite illegitimate to attempt to extend a practice springing in these cases from the very necessity of things, and adopted for a special and peculiar object, to suits of the latter kind, in which such a disclosure, if made after the cause had ended, could not inflict any of those wrongs the practice was designed to guard against.

These authorities, therefore, afford, in my opinion, no support to the respondent's first proposition. The second argument urged in support of it appears to me to be fallacious in this respect: it is said that it would be futile to order a nullity suit to be heard in camera if every one were free, after the hearing, to publish an account of the proceedings. The answer to that is, that this is not so; first, because the order would have secured that which is now, apparently, regarded as the great desideratum, without which, according to Sir Francis Jeune, justice cannot be

(1) 31 Ch. D. 55.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

done, namely, this, that the parties concerned, especially the woman, should be examined in private; and, secondly, because if anything which took place in camera were published it must be published without the privilege which protects the publication of a full and fair report of proceedings in public open Courts of justice, and would subject the publishers to all the risks attending the publication of anything which takes place in a private house or at a private meeting. If the matter published amounted to a libel or to a slander, the person defamed could sue for damages, or, possibly in the former case, prosecute for criminal libel. If the printed matter published were, in addition, indecent, the public authority might prosecute for the publication of an obscene libel, &c. To say, therefore, that an order to hear a cause in camera would be futile if people were left free to publish what took place there after the cause had ended involves an entirely inaccurate and misleading use of the word "free," quite as inaccurate and misleading as if one were to lay it down that according to the law of this country every man is free to libel or slander his neighbour.

An argument founded, as this appears to be, upon a lack of appreciation of the value of the privacy secured by such an order, and upon this rather misleading use of the word "free," is, to my mind, entirely unconvincing. Your Lordships have not been referred to any direct authority in support of the proposition contended for. And what makes the lack of direct authority all the more strange, if the proposition be sound, is this, that the records of the old Ecclesiastical Courts have been searched; passages from several old books on the practice of those Courts have been quoted; a parliamentary report, dealing, amongst other things, with the practice of the Ecclesiastical Courts, has been referred to; and the statements of many most distinguished judges made since 1857 have been dwelt upon, all in order to shew that not only had those Courts power to order nullity suits to be tried in camera, but that they frequently exercised that power, and yet nothing has been found to convey even the faintest suggestion that these orders when made had the perpetual operation and effect contended for in the present case. It is scarcely conceivable, I think, that if the respondent's contention

were sound, some reference to the matter would not have been found, or some case discovered where the restraint proved too much for human nature, and the transgressor who dared to speak was punished for his delinquency.

Speaking for myself I must therefore decline to give to the order of the learned judge, that this nullity suit be heard in camera, a meaning and operation for which, as I conceive, there is no true analogy, no precedent, no authority direct or implied, and no imperative necessity.

I think the order in its true interpretation means what on its face it plainly says, and nothing more, namely, this, that the place where the case is to be heard shall be a private chamber, not a public Court. All the consequences I have indicated follow from that alteration of the place of hearing. The order was, I think, spent when the case terminated, and had no further operation beyond that date. One of the strangest things in this strange case is that the case of *Rex* v. *Clement* (1) should be cited as an authority for the proposition that a Court of Assize or one of the Divisions of the High Court has power to prohibit the publication, after a trial has ended, of a report of the proceeding which took place at that trial.

That case is a weighty authority having regard to the eminence of the learned judges who decided it, but it is an authority against, rather than in favour of, the proposition in support of which it was cited. In that case Thistlewood and several others were jointly indicted for high treason. They pleaded not guilty. The issue knit on that plea between the Crown and the prisoners was whether they were guilty or not. In effect it was whether they, or any, and which of them were guilty, since it was quite competent for the jury to have acquitted some of them and convicted others. They would have been all tried together had they joined in their challenges. They severed in their challenges, however, with the consequence that of necessity this single issue was split up into several branches, and they were tried seriatim; but, to use the language of Bayley J. (2), these several trials constituted one entire proceeding. Abbott C.J., as he then was, knowing that the evidence in each trial would be very much the same, and

(1) 4 B. & Ald. 218. (2) Ibid. p. 229.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

fearing that if a report of each trial were published in the Press as it took place an opportunity would be given to the witnesses to trim their evidence, to the sacrifice, perhaps, of truth and the possible defeat of justice, made an order that no report of the proceedings should be published till all the trials had concluded. A report of the trials of Thistlewood and another who had been convicted was published by Clement in his newspaper, before the trial of any of the other prisoners had commenced. He was brought up before the Chief Justice and punished for contempt of Court in having acted "contrary to the order of this Court, and to the obstruction of public justice," not merely the first. The order prohibiting publication was impeached upon the ground that it prohibited the publication of a fair and accurate report of proceedings taking place in a public Court of justice after these proceedings had terminated, and it was successfully defended on the ground that all the trials formed together one entire proceeding, and that Clement's newspaper was published in the middle, and not at the end of that proceeding.

Bayley J. (1) is reported to have expressed himself thus: "But, it is argued, that if the Court has this power of prohibiting publication, there is no limit to it, and they may prohibit altogether any publication of the trial. I think that that does not follow. All that has been done in this case is very different; for the prohibition, here, has only been till the whole trial was completed." And Holroyd J., the only other judge who gave at length reasons for his decision, is (2) reported to have said: "The object for which it (the order) was made was clearly, as it appears to me, one within their jurisdiction, viz. the furtherance of justice in proceedings then pending before the Court; and it was made to remain in force so long, and so long only, as those proceedings should be pending before them. . . . . It appears to me, that the arguments as to a further power of continuing such orders in force for a longer period, do not apply. It is sufficient for the present case, that the Court have that power during the pendency of the proceedings."

The second proposition for which the respondent contends is,

(1) 4 B. & Ald. at p. 230. (2) Ibid. at pp. 232, 233.

as I understand it, this: that if a superior Court or a judge of such a Court should make a valid order in a civil suit prohibiting the doing of a particular act, not per se a crime, the doing of that act in disobedience to the order becomes a crime, a criminal contempt of Court. Even though the first proposition put forward by the respondent should, contrary to my view, be held to be sustainable, it would still be necessary for him to establish this second proposition in order to succeed on this appeal, because the act of the petitioner, in sending at the time she did copies of the shorthand writer's notes of the medical evidence given in camera to her father-in-law, sister-in-law, and a lady friend, even if not done, as she swears it was, in defence of her character and good repute, was not per se a crime. If it became a crime at all it must be because she was by the order of the Court prohibited from doing it. The same considerations apply to the act of her solicitor, who aided and abetted her in doing this forbidden act. Her contempt of Court does not appear to me, however, to fall within any of the classes of criminal contempt of Court mentioned by Lord Hardwicke in *Roach* v. *Garvan* (1), or by Lord Cottenham in *Lechmere Charlton's Case* (2), or by Lord Blackburn in *Skipworth's Case*. (3) It did not involve the scandalizing of a judge, such as was dealt with in *McLeod* v. *St. Aubyn* (4) or in *Reg.* v. *Gray*. (5) It did not involve the intimidation or corruption of jurors or witnesses in any pending or prospective suit, nor the prejudicing of the case of any litigant in any pending suit, such as was attempted in *O'Shea* v. *O'Shea and Parnell*. (6) Still less was it directed or calculated to interfere with the due course of justice in any pending litigation. It is not enough, I think, to bring it under this last head of criminal contempt of Court, that men or women may exist who, though their evidence and that of all their witnesses should be taken in camera, would prefer to suffer under the wrong nullity suits are designed to redress, rather

(1) (1742) 2 Atk. 469, at pp. 471, 472.
(2) (1836) 2 My. & Cr. 316, at p. 342.
(3) (1873) L. R. 9 Q. B. 230, at pp. 232, 233.
(4) [1899] A. C. 549.
(5) [1900] 2 Q. B. 36.
(6) 15 P. D. 59.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

than have that evidence published even after the case has ended. But the deterring of such people from seeking redress in a Court of justice is not the kind of interference with the course of justice which Lord Cottenham had in mind in the case above mentioned, when he said that its essence consisted in the doing of something calculated or designed to obtain a result of legal proceedings different from that which would follow in the ordinary course.

Of course, if the act prohibited be in itself a crime, the fact that it has been done in defiance of the prohibition would necessarily, one would suppose, aggravate the culprit's guilt. But if it be the law that disobedience of the order in itself constitutes a crime, then this result seems necessarily to follow, that all orders of Court punishing persons in any way for disobedience of this kind cannot be reviewed in the Court of Appeal inasmuch as each of them would have been made in "a criminal cause or matter" within the meaning of the 47th section of the Judicature Act of 1873. The following cases (in addition to those dealing with orders of justices made at sessions to be presently referred to) may be taken as fair specimens of those cited on behalf of the respondent in support of this, his second proposition: *Lord Wellesley* v. *Earl of Mornington* (1), *Seaward* v. *Paterson* (2), *Avory* v. *Andrews* (3), and *In re Freston.* (4)

It was contended that these cases shew that the disobedience of an order of Court constitutes in itself a crime, a criminal contempt of Court. Unfortunately for this contention, however, they do something more than that; they shew I think, conclusively, that if a person be expressly enjoined by injunction, a most solemn and authoritative form of order, from doing a particular thing, and he deliberately, in breach of that injunction, does that thing, he is not guilty of any crime whatever, but only of a civil contempt of Court. It would appear to me to be almost inconceivable that the law should tolerate such an absurd anomaly as this: that a principal who does an act he is expressly prohibited by injunction from doing should only be guilty of a civil contempt of Court, while a person not expressly or at all

(1) 11 Beav. 181.
(2) [1897] 1 Ch. 545.
(3) (1882) 30 W. R. 564.
(4) 11 Q. B. D. 545.

prohibited who aids and abets the principal in doing that very act should be held guilty of a crime, a criminal contempt of Court, with the result that the more flagrant transgressor of the two, the principal, would have a right to appeal to the Court of Appeal against any order punishing him for his misdeed, while the accessory would have no right of appeal from the order punishing him for aiding and abetting the principal to commit the forbidden act. The disrespect to the Court which made the order that was disobeyed, and the defiance of its authority, would seem to be greater in the case of the principal than in that of the accessory. The interference with the course of justice if that resulted would probably be the same in both. It can hardly be that the fact that the principal was named in the order he has disobeyed is to palliate rather than aggravate his guilt, and if not, on what principles are the cases to be differentiated? In the first of the before-mentioned cases, one Batley, the unnamed aider and abettor of the named principal who disobeyed the order of the Court, submitted, when brought before the Court, to answer for his contempt. The plaintiff in the suit did not press for punishment. The Master of the Rolls said that had he been pressed it would have been his duty to commit Batley, but he does not say for what form of contempt of Court, whether the civil contempt of Court for which the principal was found to have been guilty, or a criminal contempt of Court. The case is rather a blind one, therefore, on this point as to the nature of the contempt.

In *Seaward* v. *Paterson* (1), a case much relied upon by the respondent, the principal, Paterson, his agents and servants were restrained by injunction from, amongst other things, having, or permitting to be held, exhibitions of boxing on his premises. He held, or permitted to be held there, such an exhibition in breach of this injunction. One Murray, who was neither his agent nor servant, was present at the exhibition, aiding and abetting Paterson in holding it. The plaintiff moved that both principal and accessory should be committed for breach of the injunction. The whole controversy before North J. was whether Murray could be committed, as he was not a party to the suits, and was

(1) [1897] 1 Ch. 545.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

not named in the injunction. The learned judge held that he could be committed, not indeed for breach of the injunction, but for contempt of Court in aiding and abetting Paterson in doing an act which the latter was by the injunction prohibited from doing, and committed both Paterson and Murray to prison. Murray alone appealed from this order to the Court of Appeal. The appeal was entertained and the order appealed from upheld, but neither on the hearing before North J. nor in the Court of Appeal was it ever suggested that Murray's contempt of Court was a criminal contempt of Court. Sect. 47 of the Judicature Act of 1873 was not referred to. The points discussed were those raised in the Court below. Lord Lindley is, at p. 555, reported to have expressed himself thus: "A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order for the benefit of the person who got it. In the other case the Court will not allow its process to be set at naught and treated with contempt. In the one case the person who is interested in enforcing the order enforces it for his own benefit; in the other case, if the order of the Court has been contumaciously set at naught the offender cannot square it with the person who has obtained the order and save himself from the consequences of his act. The distinction between the two kinds of contempt is perfectly well known, although in some cases there may be a little difficulty in saying on which side of the line a case falls." The motive and object of the person who brings the offender before the Court may be different in the one case from the other. That, however, one would think could not change the nature of the offence. Lord Lindley did not grapple with the absurdity of a man who does a certain thing which he was not prohibited from doing thereby becoming a criminal, and a man who does the same thing, though he was prohibited from doing it, not

becoming a criminal. It is difficult to conceive that a judge of Lord Lindley's well-known knowledge, ability, and acuteness of mind would have gone through this long analysis of the subject without ever suggesting that either, or both, of the kinds of contempt of Court with which he dealt was necessarily criminal, if he had so regarded it.

In *Avory* v. *Andrews* (1) trustees of a friendly society were restrained by injunction from disposing of certain funds of the society in a certain way. They resigned, and new trustees were appointed in their stead. These latter did the prohibited act. Kay J. held they were guilty of contempt of Court because, though not named in the injunction, they stepped into the place of those who were named and did what the former were forbidden to do, but it was not suggested that the new trustees were guilty of any contempt of Court differing in kind from that of which the old trustees would have been guilty had they disobeyed the injunction, or that the new trustees, though not the old ones, were guilty of a criminal offence.

In the case of *In re Freston* (2) a solicitor (Freston) was, by an order of the Court of which he was an officer, required to deliver up certain documents, and also pay to a person named a sum of 10*l.* and the costs of an application made against himself. He delivered the documents, but refused or omitted to pay the sum of 10*l.* or the costs. Thereupon Denman J. made an order that an attachment should issue against him, and he was arrested while he was returning home from the police office, where he had been professionally engaged, and imprisoned. He applied to be discharged on the ground that at the time of his arrest he was privileged as an advocate from arrest. The Queen's Bench Division refused this application. Thereupon Freston appealed to the Court of Appeal. In this case, as in that of *Seaward* v. *Paterson* (3), the appeal was entertained. It was not suggested that under s. 47 of the Judicature Act the Court of Appeal had no power to hear the appeal. Lord Esher, at p. 554 of the report, lays down that where an attachment is issued for a breach of the law, or as a remedy for something that

(1) 30 W. R. 564. (2) 11 Q. B. D. 545.
(3) [1897] 1 Ch. 545.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson

is a breach of the law and in the nature of an offence, no privilege can be claimed, but where it is issued for the purpose of enforcing judgments in civil disputes, and where the breach of the order cannot be said to be an offence, the privilege can be claimed. He apparently relied much on the 4th sub-section of the Debtors Act of 1869 and s. 1 of the Debtors Act of 1878, and came to the conclusion that Freston's contempt was in the nature of an offence, but whether or not this was because of the disciplinary jurisdiction which Courts exercise over solicitors as their own officers it is rather difficult to discover. Later on the the same page he says: "The rights of those employing solicitors are not merely of a civil nature; and the Courts dealt with defaulting solicitors on the ground, that they had been guilty of breaches of duty and breaches of the law."

Lord Lindley, at p. 556, says, "Is this attachment simply in the nature of civil process? If it is, this solicitor ought to be discharged. In *McWilliams' Case* (1) Lord Redesdale L.C. has pointed out that all contempts are not the same; they are of different kinds; some contempts are merely theoretical, but others are wilful, such as disobedience to injunctions or to orders to deliver up documents—in these cases there is no privilege from arrest. In this case the attachment was granted for something more than a mere theoretical contempt, and therefore it was something more than merely civil process: there was therefore no privilege. This view is strengthened by the language of the Debtors Act, 1869, s. 4, sub-s. 4: it assumes that a solicitor who fails to pay a sum of money when ordered by the Court, is guilty of misconduct and also of an offence for which he may be punished by imprisonment; and this tends to shew that the attachment was not upon civil process." And Fry L.J., at p. 557, says, "The attachment was something more than process; it was punitive or disciplinary, for the Court was proceeding against its own officer." The appeal was dismissed.

There is not a suggestion in this case that Freston had done anything for which he could have been indicted, as every person can be who is guilty of criminal contempt of Court. Nothing

(1) (1803) 1 Sch. & Lef. 169, at p. 174.

would have been easier for the members of the Court than to have said that he was guilty of a crime if they had thought so. That would at once have solved the difficulty as to whether or not the attachment order was merely civil process. The fair inference is that they did not think so. I am, therefore, of opinion that this case, so far from being an authority that disobedience per se of an order of Court, irrespective of the nature of the thing ordered to be done, is a criminal offence, is an authority to the contrary. Some reliance was, in argument, placed upon authorities not cited in the Court of Appeal, such as *Reg.* v. *Ferrall* (1), to shew that the disobedience of an order made by justices of the peace constitutes an indictable offence. These cases are dealt with in Russell on Crimes, 7th ed., vol. 1, p. 543, and Chitty's Criminal Law, 2nd ed., vol. 2, p. 279, and are all collected in Archbold's Criminal Pleading and Evidence, 23rd ed., p. 1088. The orders referred to are usually made upon the treasurer of a county to pay the costs of prosecutions, or upon a person to pay under the poor law the costs of maintenance of a relative, or upon putative fathers to pay the cost of the maintenance of their illegitimate children. In *Rex* v. *Robinson* (2) Lord Mansfield lays it down broadly that disobedience of an order of sessions is an indictable offence at common law. *Rex* v. *Bristow* (3) is to a similar effect. In *Rex* v. *Johnson* (4) the order was made by the justices on the county treasurer to pay the expenses of a prosecution, and it was held this officer might be indicted if he refused or omitted to do so. The same result would apparently follow if a similar order had been made by the going judge of assize: *Rex* v. *Jeyes*. (5)

The observations of Pollock C.B. in giving judgment in *Reg.* v. *Ferrall* (6) are very significant. He says: "The authorities are clear upon the point, that an indictment will lie for a refusal to comply with an order of justices for the payment of money; and although I individually should not be disposed to hold, for the first time, that such a refusal was indictable since a like refusal to comply with an order of a superior Court is not so, yet, I feel

(1) (1850) 2 Den. C. C. 51.
(2) (1759) 2 Burr. 799, at p. 804.
(3) (1795) 6 T. R. 168.
(4) (1816) 4 M. & S. 515.
(5) (1835) 3 Ad. & E. 416.
(6) 2 Den. C. C. at p. 56.

H. L. (E.) 1913

SCOTT v. SCOTT.

Lord Atkinson.

bound by the authorities to concur with the rest of the Court in this view of the law."

This rule of the common law would appear to have sprung out of the necessities of such cases as these. The money ordered to be paid could not be sued for and recovered as a debt, specialty or simple contract, due to the person to whom it was ordered to be paid, and justices had no power to issue writs of attachment to compel obedience to their orders. Indictment was, therefore, the only remedy available. But these orders were not orders made inter partes in civil suits, such as orders to hear a civil cause in camera, and do not support in any way, in my view, the respondent's second proposition. In my opinion that proposition is unsound. The burden of establishing it lay upon the respondent. He has, I think, failed to discharge that burden. Lord Moulton, in his able and elaborate judgment in the Court of Appeal in this case at p. 268 of the report, lays down in the following passage what, in my opinion, is the true and sound principle of the law. "It is only the Legislature that can render criminal an act which is not so by the common law of the land. An order of the Court in a civil action or suit creates an obligation upon the parties to whom it applies, the breach of which can be and in general will be punished by the Court, and in proper cases such punishment may include imprisonment. But it does no more. It does not make such disobedience a criminal act, and therefore it is that the Court of Appeal has consistently and without any exception held that orders punishing persons for disobedience to an order of the Court are subject to appeal." This view of the law is not, I think, in conflict with authority, and is logical and rational in itself.

In my opinion the cases cited in reference to wards of Court afford no assistance upon any of the points in controversy on this appeal, inasmuch as judges in these cases act as the representatives of the Sovereign as parens patriæ, and exercise on his behalf a paternal and quasi-domestic jurisdiction over the person and property of the wards for the benefit of the latter. Even if it be assumed that the Ecclesiastical Courts had jurisdiction to order nullity suits to be tried in camera, that power is now only to be exercised by the Court for Divorce and Matrimonial Causes,

according to the provisions of the 22nd section of the Matrimonial Causes Act of 1857, subject to the provisions of that Act and the rules and orders made thereunder. The words "rules and regulations" not "rules and orders" are used in the 46th and 67th sections. I think these two expressions mean the same thing. No such rules, regulations, or orders having been made, the provisions of the 46th section operate directly with their full force and effect on suits of this character. And it certainly appears to me that the hearing of these suits in camera is opposed not only to the policy of this statute, but is prohibited by the express and positive enactments of its 46th section. These provisions may to some extent be modified by "rules and orders" framed and published in the mode provided, but they cannot be modified by the order of a judge.

It is not necessary in the present case to determine whether the broad proposition laid down by Sir Francis Jeune (as he then was) in *D.* v. *D.* (1) is well founded. The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect. I am inclined to think that the practice of which the learned judge approved and in this case inaugurated would restrict this wholesome publicity more than is warranted by authority. And I desire to point out that, if the practice were adopted, and if orders to hear a cause in camera were to have the effect contended for in the present case, this rather injurious result might follow. If perpetual silence were enjoined upon every one touching what takes place at a hearing in camera, the conduct and action of the judge at the trial, his rulings, directions, or decisions on questions of law or fact, could never be reviewed in a Court of Appeal at the instance of a party aggrieved, unless indeed upon the terms that that party should consent to become a criminal

(1) [1903] P. 144.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

and render himself liable to be fined and imprisoned for criminal contempt of Court, a serious invasion of the rights of the subject.

Even if the party aggrieved might be able to obtain from the Court that made the order permission to violate it to the extent necessary to prosecute the appeal, the secrecy enjoined could only be secured by the appeal to the Court of Appeal, and, possibly, from that Court to this House, being also heard in camera, a serious alteration, I think, of the present practice.

It only remains for me to deal with the form of the proceedings adopted in this case taken in connection with the construction of the 47th section of the Judicature Act. If a certain act may be viewed in either of two aspects, the one criminal and the other simply tortious, it is, I think, essential, in order to bring a judgment or order dealing with it within this section, that it should clearly appear on the face of the judgment or order that the act is dealt with in its criminal, and not in its civil, aspect. Were it otherwise a judgment for damages in a case of wilful and deliberate assault could not be reviewed by a Court of Appeal since wilful assault is a crime. Now Lindley L.J., in *O'Shea* v. *O'Shea and Parnell* (1), is reported as having expressed himself thus: "There are obviously contempts and contempts; there is an ambiguity in the word; and an attachment may sometimes be regarded as a civil proceeding. For instance, where an order was made by the Court of Chancery in former days there was no mode of enforcing such an order but by attachment. We must not, therefore, be misled by the words 'contempt' and 'attachment,' but we must look at the substance of the thing. In the present case I have no doubt that the proceeding is a summary conviction for a criminal offence, and therefore no appeal lies." To accuse one, therefore, of being guilty of a contempt of Court does not, I think, necessarily imply that he has committed a crime, nor is the criminality of the act necessarily implied by the added allegation that the contempt consisted in the violation of an order of Court.

In this case the order alleged to have been disobeyed was

(1) 15 P. D. 59, at p. 64.

simply an order "that the cause should be heard in camera," nothing more. If one turns to the notice of November 23, 1911, of the motion upon which the order appealed from was made, it is obvious that the person who framed it never thought he was making any criminal charge whatever. The notice is not entitled in any separate cause or matter, as it should have been according to the judgment of the Court of Appeal in *O'Shea* v. *O'Shea and Parnell* (1), in order to shew that it dealt, to use the words of Lopes L.J., with something outside the cause, and was not a mere step in the cause. On the contrary it is entitled just as any notice of a motion which was a step in the cause would be entitled. The charge made was that the petitioner (a party to the suit bound by the orders made in it) and her solicitor (over whom as an officer of the Court the judge had disciplinary powers) had been guilty of contempt of Court in publishing a transcript of the shorthand writer's notes of the medical evidence in contradiction of the order of February 11, 1911, directing the cause to be heard in camera. The relief prayed for is, in substance, this: (1.) That the petitioner and her solicitor should be committed to prison; (2.) that they should be restrained from making any similar or other communication either directly or indirectly concerning or relating to the subject of the suit; (3.) that they should be restrained from molesting in this or in any other way the respondent and friends, doctors, patients, or others (the others not being identified in any way); (4.) that the petitioner and her solicitor should be required to state on oath the names and addresses of the persons to whom they have made similar communications.

All these different kinds of relief might possibly be rightly and rationally asked for (I express no opinion upon that point) if what was complained of was a civil contempt of Court, like the mere breach of an injunction, but if it was meant to charge these two persons with a criminal offence, and to ask for their summary conviction for it, the notice of motion is grotesque in its absurdity. Who ever heard of a criminal being restrained by an order similar to an injunction from the repetition of his crime, or the commission of some other and different though

(1) 15 P. D. 59.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Atkinson.

similar crime, not to speak of a criminal having been asked to discover on oath the evidence to secure his own conviction of the crime of which he is accused, or of some other crime of a similar character?

There is a well-known procedure in the nature of preventive justice, by which it may be sought to prevent the commission of crime, but it is not this. It consists in requiring the person likely to commit the crime to enter into recognizances to keep the peace and be of good behaviour to all His Majesty's subjects, and in default to be committed to prison. It is impossible to think that Bargrave Deane J. should have consciously taken a part in such a travesty of criminal procedure as this notice invites him to embark in. Yet he makes no allusion to the absurdities of the notice of motion. The curial part of his order runs thus: "The judge found that the petitioner and her solicitor had been guilty of contempt of Court, and thereupon ordered that the petitioner and her solicitor, Mr. Percy Braby, do pay the costs of this application." But of what kind of contempt, civil or criminal, he has found them to have been guilty the order does not disclose.

In the absence of any allegation expressed or implied to the contrary, it must, I think, be assumed that the contempt of Court for which the parties were condemned was the particular kind of contempt charged in the notice of motion. I quite admit it was competent for the learned judge to have put aside all the nonsense contained in the notice of motion, to have had its title amended, and to have had entitled his own order in conformity with the amended notice, but he has not done so. The relevant portion of his judgment leaves one still in doubt as to the sense in which he used those words, "of ambiguous meaning," according to Lord Lindley. It runs thus:

"It must be clearly understood in future that the whole object of trying these unhappy cases in camera is that they should be kept secret and private. The result may be known, but none of the details; and it is a gross contempt of Court when the Court says, 'I will try this case in my private room,' for people to go spreading about the country the shorthand notes of what took place in the private room. It must be understood in future

that anything done in chambers is private. Even summonses are not reported without leave of the Court when there is something important." (1)

It puts everything done in chambers on a level with nullity suits heard in camera, and, if the respondents are right in their first contention, announces that perpetual silence shall be enjoined in the one class of cases as well as in the other.

I concur, therefore, with Vaughan Williams L.J. in thinking that the order appealed from to the Court of Appeal was an order in a civil proceeding, and not an order in a criminal cause or matter within the meaning of the 47th section of the Judicature Act of 1873, and for this, as well as for the other reasons I have mentioned, am of opinion that this appeal should be allowed, with costs.

I am further of opinion that the decision of Bargrave Deane J. was erroneous, and that, as your Lordships have now before you all the materials necessary to enable you to do complete justice between the parties, the order should now be made which your Lordships are of opinion the Court of Appeal ought to have made had they not yielded to the preliminary objection and had heard the appeal, namely, an order that the order appealed from to the Court of Appeal be set aside and vacated, and the applicant be ordered to pay the costs of the motion to commit the petitioner to prison, and also the costs in the Court of Appeal and the costs of this appeal.

LORD SHAW OF DUNFERMLINE. (2) My Lords, the appellant, Annie Maria Scott, and the respondent, Kenneth Mackenzie Scott, were married on July 8, 1899. On January 12, 1911, the appellant instituted this suit for a declaration of nullity of marriage. On February 14 an order was pronounced, of the character familiar in such cases, for the medical examination of the parties and for report. The concluding words of that order were as follows: "And I do further order that this cause be heard in camera."

(1) This passage appears in a somewhat different form in the report of the judgment of Bargrave Deane J. in the *Law Reports*.

(2) Read by Lord Atkinson.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

Thereafter the respondent withdrew an answer which he had put in to the case—which accordingly proceeded undefended. The evidence was given and the hearing took place in camera, and on June 13, 1911, the President pronounced a decree nisi with costs. So far as the hearing of the case in camera was concerned, the order made was obeyed.

Towards the end of the year 1911, however, Mrs. Scott obtained an official transcript of the shorthand notes of the proceedings, and sent to the respondent's father, to his sister, and to one other person, typewritten copies thereof. She swears in her affidavit that she did this with a view to vindicate herself in the eyes of those persons, and to prevent their being prejudiced against her by false reports. There is no question in this case that the three copies issued were accurate, or that the report of the proceedings was true.

The respondent founds upon this action by the appellant as a contempt of Court, and in his notice of motion for December 4, 1911, he asks that the appellant, Annie Maria Scott, and her solicitor, Mr. Percy Braby, and his partner, Mr. Waller (who on her instructions had obtained the copies of the proceedings), be committed to prison for their contempt of Court; secondly, that they be restrained "from making any similar or other communications, either directly or indirectly, concerning or relating to the subject-matter of this cause," and, thirdly, "from otherwise molesting the respondent, his relatives and friends, doctors, patients, and others"; while fourthly, he moves that the appellants "be directed to state on oath the names of the persons and their addresses to whom similar communications have been made."

If this motion be, as was contended, a motion in a criminal cause or matter, it is manifest that it was also much more, for it was not a motion merely for commitment in respect of the alleged contempt, but it was also a motion for an injunction of perpetual silence with regard to what had transpired in the proceedings in camera. In the next place, it was an injunction against molestation; and, lastly, it was a discovery, and a discovery sought from the alleged criminals by their stating on oath the names, addresses, and particulars of their criminal contempt. These

and particularly the last, are singular accompaniments of a step in a criminal cause or matter. The last seems to be an abrogation of the elementary principle that an accused person is not bound to incriminate himself. The majority of the Court of Appeal, holding that the question arose in a criminal cause or matter, have declared a civil appeal incompetent. Against this judgment the present appeal to this House is brought.

But the argument before your Lordships was not confined to this point of competency—of civil or criminal; it ranged over the whole merits of the occurrence and was full and elaborate; it included a discussion of the powers of the old Ecclesiastical Courts and necessitated a reference to the question of the open administration of English justice as a whole.

On the actual case before the House there are two substantial matters falling to be dealt with. In the first place, did the communication of a transcript of the Court proceedings—after the actual proceedings had come to an end—constitute a contemptuous disobedience to the order that they should be heard in camera? In the second place, was that order itself properly and legitimately pronounced? Both of these matters, my Lords, appear to me to be deserving of grave and serious consideration. And I observe of both, but particularly of the latter, that I think them to be closely connected with questions of the deepest import affecting the powers of Courts of justice and the liberty of the subjects of the Crown.

After a not inconsiderable study of the authorities and history in relation to this subject, I will venture to enter, notwithstanding the dicta to which I am about to refer, my respectful protest against the assumption of any general power by the present English Courts of law to administer this branch of justice and to try suits for declaration of nullity of marriage, or indeed to hold any Courts of justice with closed doors. Nor do I confine my rejection of this assumption merely to the existing High Court under the Judicature Act of 1873, nor even to the Matrimonial Court set up by the statute of 1857. For I think it right to make some examination in the first place of the power of the old Ecclesiastical Courts, as to which I humbly think that much misapprehension has prevailed.

H. L. (E.) 1913

SCOTT v. SCOTT.

Lord Shaw of Dunfermline.

My Lords, the forms of the old Ecclesiastical Courts were manifestly derived from those in use under the general body of canon law, which, as Stair expresses it in a passage adopted by the Ecclesiastical Commissioners of 1832, "extended to all persons and things belonging to the Roman Church, and separate from the Laity; to all things relating to pious uses; to the guardianship of orphans; the wills of defuncts; and matters of marriage and divorce; all which were exempted from the civil authority of the Sovereigns, who were devoted to the See of Rome. So deeply has this law been rooted, that even where the Pope's authority has been rejected, yet consideration has been had to these laws, not only as those by which Church benefices have been erected and ordered, but as likewise containing many equitable and profitable laws, which because of their weighty matter, and their being received, may more fitly be retained than rejected."

In the early stages of the suit, the Ecclesiastical Court, charging itself with the interests of both parties, took upon itself the inquiry into the facts, not in foro contentioso nor in foro aperto, but by way of obtaining, first from the one side, and then, if there was a denial or a counter case, from the other side, and from each apart from the other, the testimony of witnesses, this testimony to lie in retentis until, according to modern ideas, the real trial of the case should begin.

The true meaning of these preliminary inquiries was substantially this, that the story of each side was told without either the fear or the presence of the other, and without the knowledge or the desire to evade or mitigate the force of opposing evidence. They constituted an official precognition; I think they are referred to under that name. When these private and preliminary inquiries were ended, and after that stage of precognition was completed, the stage of "publication" was reached; and publication meant the opening of the documents—up to that point sealed—and the disclosure of their contents to the other party and to the judge. (1)

The true question to be determined as to the procedure of the

(1) [Such was also the course of the old Court of Chancery, which was founded on the "summary" ecclesiastical procedure.—F. P.]

Ecclesiastical Courts is not what had been done up to that stage, but what was done after that stage. For my own part I incline to the opinion that, after the stage of publication was reached, the Ecclesiastical Courts conducted their proceedings openly, and that there is no real ground for the suggestion that this subsequent procedure was secret. I accordingly enter my respectful dissent against observations—mostly made obiter—which have been cited from learned judges, that a continuance of the old ecclesiastical procedure justifies any inference that this department of justice was to be optionally secret.

These observations, although made from the Bench, were in point of fact cited by the learned counsel for the respondent, not as observations made in judicio but rather in testimonio. It was said that when Lord Penzance, Sir James Hannen, and Sir Francis Jeune made allusions to the old practice of the Ecclesiastical Court, they may have felt justified in their language by their own recollections. There is force in this view; although, of course, it would be improper to attach too serious weight to these references, which are, with one exception, of a slender and almost casual kind. But they have induced me, after an independent investigation, to trouble your Lordships with more than a passing reference to the practice of the Ecclesiastical Court. Its procedure is detailed with the utmost minuteness in Oughton's "Ordo Judiciorum," published in London in 1738; and it will be found from such a text-book that no support can be obtained for the view that subsequent to the stage of "publication" to which I have referred, the Ecclesiastical Courts, either as a matter of practice or in the exercise of a power, acted as secret tribunals.

But it is in truth unnecessary to go through the text-books—Conset and the others; because testimony of the greatest weight on this topic is obtained from the report of the Commissioners appointed to inquire into the practice and jurisdiction of the Ecclesiastical Courts in 1832. The personnel of the Commission gives this unanimous report the highest authority. For, in addition to the Archbishop of Canterbury and several members of the Episcopal Bench, the Commission included Lord Tenterden, Lord Wynford, and Chief Justice Tindal, together with other men

H. L. (E.) 1913

SCOTT v. SCOTT.

Lord Shaw of Dunfermline.

of great accomplishments and learning, including Mr. Stephen Lushington.

The course of proceeding of the Ecclesiastical Courts is dealt with in detail, including the mode of taking evidence by depositions, and the examination and cross-examination of witnesses by the examiners of the Court, who were employed for that purpose by the registrars. So far up to the stage of publication. The report then proceeds as follows:—

"The evidence on both sides being published, the cause is set down for hearing. All the papers, the pleas, exhibits, interrogatories and depositions, are delivered to the judge; who, having them in his possession for some days before the cause is opened, has a full opportunity of perusing, and carefully considering, the whole evidence, and all the circumstances of the case, and of preparing himself for hearing it fully discussed by counsel. All causes are heard publicly, in open Court; and on the day appointed for the hearing, the cause is opened by the counsel on both sides, who state the points of law and fact which they mean to maintain in argument; the evidence is then read, unless the judge signifies that he has already read it, and even then particular parts are read again, if necessary, and the whole case is argued and discussed by the counsel.

"The judgment of the Court is then pronounced upon the law and facts of the case; and in discharging this very responsible duty, the judge publicly, in open Court, assigns the reasons for his decisions, stating the principles and authorities on which he decides the matters of law, and reciting or adverting to the various parts of the evidence from which he deduces his conclusions of fact; and thus the matter in controversy between the parties becomes adjudged. Reports of decisions in the Ecclesiastical Courts were not in former times laid before the public, like those of the Courts of Westminster Hall; but for the last twenty years and upwards, the judgments of these Courts have been regularly reported. These reports are not only useful in the jurisdiction itself, and the inferior Courts, but they also serve to explain to the Temporal Courts the principles of ecclesiastical decisions, so as to enable them to form a more correct

judgment of the proceedings, when they may have occasion to refer to them."

My Lords, accepting, as I do, this account of ecclesiastical procedure in England, I do not entertain any real doubt that the Ecclesiastical Courts, from the moment when they sat to open the depositions of the witnesses, and throughout the whole course of the trial thereafter, were open Courts of the realm. They did not presume to pursue a practice or exercise a power inconsistent with that fact.

This state of matters may, no doubt, have been occasionally, and perhaps with increasing frequency, in the fourth and fifth decades of last century, departed from; but it was, I incline to believe, never departed from under challenge, and this undermining of what was, in my view, a sound and very sacred part of the constitution of the country and the administration of justice did not take place under legislative sanction, nor did it do so by the authority of the judges, on any occasion where the point of power to exclude the public was argued pro and contra.

And so far as regards even cases thus tried in camera by request or without objection, the large body of Consistorial Reports forms a comprehensive and complete refutation of the suggestion that such an order for a private trial was equivalent to a decree of perpetual silence on the subject of what had transpired within the doors of a Court thus closed. Until this case occurred I never suspected that parties, witnesses, solicitors, or counsel were put under such a disability or restraint; nor did it ever occur to me that the learned reporters of consistorial causes have by a series of contempts of Court continued to instruct the world.

My Lords, I am aware that the view which I now put forward as to the old practice and power of the Ecclesiastical Courts is not shared to the full by the judges of the Court below, but after the full argument at your Lordships' Bar I see no reason to doubt its substantial accuracy. I think the state of matters when the Divorce and Matrimonial Causes Act of 1857 became law was what I have ventured to describe. Occasional lapses had occurred from the wholesome rule of open justice in this country—lapses accounted for in all possibility sometimes by a

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

feeling of delicacy, and sometimes, I do not myself doubt, by the idea that the rule of open justice might be occasionally obscured in the interests of judicial decorum. I mention this last idea because its recrudescence, even after the statute of 1857, is one of the striking historical developments of this branch of the law.

By s. 22 of the statute of 1857 it was provided, "In all suits and proceedings, other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act." My Lords, there is nothing in that section which sanctions the idea that the Ecclesiastical Court had either a principle or a rule of sitting with closed doors. It had undoubtedly a principle of having the witnesses interrogated by examiners representing the Court registrars, but beyond that, and from the stage of publication onwards, there was no principle or rule for a secret tribunal.

The new Court set up would have remained accordingly free to deal with the taking of evidence itself as a preliminary and in private. But this was specifically the subject of s. 46, which is to the following effect: "Subject to such rules and regulations as may be established as herein provided, the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court: Provided that parties, except as hereinafter provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed."

This section of the Act of 1857, my Lords, although no doubt it may have been meant incidentally as a useful corrective to dangerous ideas which were appearing to invade little by little the open administration of justice, was substantially a declaratory

section, for, once the preliminary inquiries had been brought within the range of judicial proceedings, then the proceedings as a whole were by a statute declared to be in open Court throughout.

I may observe that, although the law and practice of Scotland are far less dependent on statute than in England, yet in the particular under discussion Scotland had anticipated the Act of 1857 by express statutory enactment passed in the year 1693. The two Acts of June 12 of that year were in truth a part of the emphatic testimony borne to the determination of the nation to reap the full fruit of the Revolution Settlement and to secure against judges, as well as against the Sovereign, the liberties of the realm. The one Act affects civil procedure; the other statute affecting criminal procedure is to the same effect, with an excepting declaration applicable to cases "of rapt, adultery, and the like."

And, my Lords, in my humble opinion these sections of the Act of 1857 were declaratory in another sense. They brought the matrimonial and divorce procedure exactly up to the level of the common law of England. I cannot bring myself to believe that they prescribed a standard of open justice for these cases either higher or lower than that for all other causes whatsoever. And it is to this point accordingly that the discussion must come. The historical examination clears the ground. So that the tests of whether we are in the region of constitutional right or of judicial discretion—of openness or of optional secrecy in justice —are general tests.

As to the Act of 1857, my Lords, I repeat that I make no excuse for founding upon the terms of these two sections—ss. 22 and 46—in combination. For if the view which I have taken be correct, namely, that all was open in the Ecclesiastical Courts except the examination of witnesses, then these two sections put together mean this, that all was to be open in future in the Ecclesiastical Courts, without any such exception whatsoever. When a cause is begun in the Divorce Court a contract of litis contestatio is entered into in short upon the ordinary terms. The old private examination of witnesses is abolished; the new system is an open system.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

I am of opinion that the order to hear this case in camera was beyond the power of the judge to pronounce. I am further of opinion that, even on the assumption that such an order had been within his power, it was beyond his power to impose a suppression of all reports of what passed at the trial after the trial had come to an end. But in order to see the true gravity of what has occurred, these two things must be taken together. So taken, my Lords, they appear to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security. The Court of Appeal has by its majority declared a review of this judgment by it to be incompetent. I therefore make no apology for treating the situation thus reached as most serious for the citizens of this country.

Consider for a moment the position of the appellants. The case of *Scott* v. *Scott* was heard in camera. All interruption or impediment either to the elucidation of truth, or the dignity or decorum of the proceedings,—conceived to be possible by the presence of the public—had been avoided. The Court had passed judgment in private and the case was at an end. And now judgment has been passed upon the appellants in respect of disclosing what transpired in Court by exhibiting an accurate transcript of what had actually occurred, and the appellants are enjoined to perpetual silence. And against this—which is a declaration that the proceedings in an English Court of justice shall remain for ever shrouded in impenetrable secrecy—there is, it is said, no appeal. I candidly confess, my Lords, that the whole proceeding shocks me. I admit the embarrassment produced to the learned judge of first instance and to the majority of the Court of Appeal by the state of the decisions; but those decisions, in my humble judgment, or rather,—for it is in nearly all the instances only so,—these expressions of opinion by the way, have signified not alone an encroachment upon and suppression of private right, but the gradual invasion and undermining of constitutional security. This result, which is declared by the Courts below to have been legitimately reached under a free Constitution, is exactly the same result which would have been achieved

under, and have accorded with, the genius and practice of despotism.

What has happened is a usurpation—a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.

It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity." But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise."

I myself should be very slow indeed (I shall speak of the exceptions hereafter) to throw any doubt upon this topic. The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary—and they appear to me still to demand of it—a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure,

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of the law.

To begin with it was not so. No encroachment upon the broad stipulations of the statute of 1857 may have at first occurred. But two years after the Act was passed the cases of *Barnett* v. *Barnett* (1) and of *H.* (*falsely called C.*) v. *C.* (2) were tried. In the former, which was a suit by a wife for judicial separation on the ground of cruelty, her counsel asked that the evidence might be taken before an examiner. The meaning of that, my Lords, was that it was a motion almost in express terms that the secret procedure which had been ended by Parliament should be resumed by the Court. The motion was refused by Sir Cresswell Cresswell. In the latter, which was a suit to declare a nullity of marriage, on the same ground as in the present case, counsel asked that the cause might be heard in camera. The cause came on for hearing before the Full Court, namely, Sir Cresswell Cresswell, the Judge Ordinary, Williams J., and Bramwell B. The judgment of Bramwell B. was conclusive, none the less so that he indicates that he knew already that the practice, which he was condemning as illegal, was already creeping in. The learned judge said: "If this had been the first application of the kind, I also should have thought it perfectly clear that this being a new Court was constituted with the ordinary incidents of other English Courts of justice, and, therefore, that its proceedings should be conducted in public. Upon that question I should not have felt the slightest doubt; and the only doubt I now entertain is in consequence of this Court having since it was established, on two occasions, sat in private. But in those cases I understand that that course was adopted with the consent of both parties, and that no discussion took place. In my opinion the Court possesses no such power."

My Lords, I think it would have been better had those

(1) 29 L. J. (P. & M.) 28. (2) 29 L. J. (P. & M.) 29.

attempts to evade the publicity commanded by the statute then ceased and the judgment of Bramwell B. been accepted as law. But the respondents found upon expressions of opinion such as those to which I now refer. In *C.* v. *C.* (1), in the year 1869, Lord Penzance, dealing with a case which was not a suit for nullity, made this observation: "The only causes which have been heard in private are suits for nullity of marriage, and in doing so, the Court has followed the practice of the Ecclesiastical Courts, which it is expressly empowered to do in such suits by the 22nd section of 20 & 21 Vict. c. 85." My Lords, that point was not a point of decision. I do not see that any argument upon the subject was presented to the Court. I cannot take the learned judge as having laid down that the practice of the Ecclesiastical Court was anything other than what is recorded with much authority by the Ecclesiastical Commissioners in the passage which I have cited.

The next expression founded upon is that by Sir James Hannen. (2) It is clear that that learned judge was much exercised upon the subject; for, having cited the judgments of Sir Cresswell Cresswell and Williams J. and Bramwell B., to which I have just referred, "that the Court had no power to sit otherwise than with open doors," the learned judge adds: "It would seem, however, that that rule has not been acted upon. On the contrary, such cases have been heard in camera both by my predecessor and myself, and I therefore think it must be taken that the impression which was entertained by Sir Cresswell Cresswell was afterwards abandoned." I must say, my Lords, that, accepting this as historically accurate, it appears to me to be a confession of a progressive departure from the law. No doubt it bound the learned judge, but it is an illustration of that to which I have already alluded, namely, the liability, unless the most vigorous vigilance is practised, to have constitutional rights, and even the imperative of Parliament, whittled away by the practice of the judiciary. It was no wonder that in the later case in 1876 (3) even the Master of the Rolls, Jessel, made an exception to the rule of open Courts of justice of "those cases

(1) L. R. 1 P. & M. 640. (2) *A.* v. *A.*, L. R. 3 P. & M. 230.
(3) *Nagle-Gillman* v. *Christopher*, 4 Ch. D. 173.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

where the practice of the old Ecclesiastical Courts in this respect is continued." But it is perfectly manifest that the practice of the old Ecclesiastical Courts was not continued. Taking evidence under private examination was stopped. What was continued was the remainder of the practice, which was open, and the closed portion was by statute declared also to be open. But while this observation was made by Sir George Jessel, obiter in that case, his judgment upon the main question was one that must command respect. He "considered that the High Court of Justice had no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of Court, or where a public trial would defeat the object of the action." These, my Lords, constitute the exceptions, definite in character and founded upon definite principles, to which I shall in a little allude.

But in the year 1903, in *D.* v. *D.* (1), Sir Francis Jeune brought these dicta to this culmination: "I believe that the reason why the Ecclesiastical Courts were accustomed to hear suits for nullity in private was not merely because they were suits for nullity; but because, in the exercise of the general powers which those Courts possessed, they were of opinion that those suits ought not to be heard in public. In my view, they might have heard every suit in private." My Lords, I respectfully differ from this dictum. It appears to me to be historically and legally indefensible.

I cannot do justice to this subject without a reference to two cases which were much discussed. One of these was a test case which occurred so late as the year 1889. I refer to *Malan* v. *Young*. (2) By this time undoubtedly the occasional usurpation —for I call it no less—by the Courts of a power to hear cases in camera was beginning to grow into at least the semblance of a practice; and Denman J. held that he had power to hear the Sherborne School case in camera. Mr. Gould, a member of the Bar, objected to leave the Court, and only retired therefrom upon express order by the judge and under protest. But the case had a sequel which is described in the judgment of Vaughan Williams L.J., who ratifies with his authority and on his own knowledge and recollection the following account in the Annual

(1) [1903] P. 144. (2) 6 Times L. R. 38.

Practice of 1912:—"The following subsequent occurrence is, however, unreported:—The trial proceeded in camera on 11th, 12th, and 13th November, 1889, and was adjourned to 15th January, 1890, when the judge stated that, in view of the fact that there was considerable doubt among the judges as to the power to hear cases in camera, even by consent, he would ask the parties to elect to take the risk of going on with the case before him in camera, or begin it de novo in public. The parties elected to go on with the case before the judge as arbitrator, and to accept his decision as final, subject to the condition that judgment should be given in public, which was done (extracted from the Associate's recorded note of the case)."

The other case referred to was that of *Andrew* v. *Raeburn*. (1) But, my Lords, there was there no decision whatsoever of the point to be now determined. It was an action to prevent the disclosure of documents alleged to be private and confidential. In the course of his judgment Earl Cairns said: "If it had appeared to me that this was a case in which a hearing in public would cause an entire destruction of the whole matter in dispute," (a matter not of the rule but of an exception to the rule, as I shall hereafter explain) "I should have taken time to consider whether it was consistent with the practice of the Court to hear it in private even without the consent of both parties, in order to prevent such entire destruction of the matter in dispute. But from the nature of this case it appears to me impossible to say that the subject of the suit would be destroyed by a public hearing." Thus far for the decision. But in a concluding sentence the learned Earl said, "Under these circumstances I do not think it would be right to deviate from what has undoubtedly been the practice of the Court—not to hear a case in private except with the consent of both parties." To infer from this sentence, not adopted or concurred in by either James L.J. or Sir John Mellish, that it was open to the judges of England to turn their Courts into secret tribunals, if both parties to any suits asked or consented to that being done, is to make an inference from which I feel certain that the noble Earl would himself have shrunk, and against which, indeed, my belief is that he

(1) L. R. 9 Ch. 522.

H. L. (E.) 1913

SCOTT v. SCOTT.

Lord Shaw of Dunfermline.

would have strongly protested. For myself, I think such an inference to be contrary to one of the elements which constitute our true security for justice under the Constitution, and to form no warrant for an invasion and inversion of that security, such as has been made in the present case.

My Lords, it is very necessary, indeed, to make, in the matter of contempts of Court, clear distinctions. One has, for instance, to distinguish acts external to the administration of justice and truly subversive of it. These are essentially of a criminal character. They tend to prejudice a party to a suit in the eyes of the public, the Court, or the jury, or to intimidate witnesses, or interfere with the course or achievement of justice in a pending action. The case of *O'Shea* (1) was of this class. One has also to distinguish acts—also essentially criminal in their nature—acts of disturbance, or riot, which prevent the business of a Court of justice being duly or decorously conducted.

In both of these cases a Court can protect its administration and all those who share or are convened to its labours. And in both cases the authors of the prejudice or intimidation, on the one hand, or the participators in the disturbance or riot, on the other, are guilty of a contempt: and a Court of justice can protect itself against these things both by suppression and by punishment.

But here, my Lords, the question affects not such a power, namely, to see to it that justice shall be conducted in order and without interruption or fear, but a power—for that is what is really claimed—to make the proceedings of an English Court of justice secret because of something in the nature of the case before it.

Upon this head it is true that to the application of the general rule of publicity there are three well recognized exceptions which arise out of the nature of the proceedings themselves.

The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention—trade secrets—is of the essence of the cause. The first two of these

(1) 15 P. D. 59.

cases, my Lords, depend upon the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as parens patriæ. The affairs are truly private affairs; the transactions are transactions truly intra familiam; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs. The third case—that of secret processes, inventions, documents, or the like—depends upon this: that the rights of the subject are bound up with the preservation of the secret. To divulge that to the world, under the excuse of a report of proceedings in a Court of law, would be to destroy that very protection which the subject seeks at the Court's hands. It has long been undoubted that the right to have judicial proceedings in public does not extend to a violation of that secret which the Court may judicially determine to be of patrimonial value and to maintain.

But I desire to add this further observation with regard to all of these cases, my Lords, that, when respect has thus been paid to the object of the suit, the rule of publicity may be resumed. I know of no principle which would entitle a Court to compel a ward to remain silent for life in regard to judicial proceedings which occurred during his tutelage, nor a person who was temporarily insane—after he had fully recovered his sanity and his liberty—to remain perpetually silent with regard to judicial proceedings which occurred during the period of his incapacity. And even in the last case, namely, that of trade secrets, I should be surprised to learn that any proceedings for contempt of Court could be taken against a person for divulging what had happened in a litigation after the secrecy or confidentiality had been abandoned and the secrets had become public property.

The present case, my Lords, is not within any of these exceptions, and is not within the ratio or principle which underlies them. The learned judge himself, following certain encroachments of authority, made a general exercise of power concerning proceedings of a certain nature in his Court, and really bringing the denial of the open administration of this part of the law within the range of ordinary judicial discretion.

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

For the reasons which I have given, I am of opinion that the judgment of Bargrave Deane J. cannot be sustained. It was, in my opinion, an exercise of judicial power violating the freedom of Mrs. Scott in the exercise of those elementary and constitutional rights which she possessed, and in suppression of the security which by our Constitution has been found to be best guaranteed by the open administration of justice. I think, further, that the order to hear the case in camera was not only a mistake, but was beyond the judge's power; while, on the other hand, the extension of the restrictive operation of any ruling—that a case should be heard in camera—to the actions of parties, witnesses, counsel, or solicitors, in a case, after that case has come to an end, seems to me to have really nothing to do with the administration of justice. Justice has been done and its task is ended; and I know of no warrant for such an extension beyond the time when that result has been achieved. It is no longer possible to interfere with it, to impede it, to render its proceedings nugatory. To extend the powers of a judge so as to restrain or forbid a narrative of the proceedings either by speech or by writing, seems to me to be an unwarrantable stretch of judicial authority.

I may be allowed to add that I should most deeply regret if the law were other than what I have stated it to be. If the judgments, first, declaring that the cause should be heard in camera, and, secondly, finding Mrs. Scott guilty of contempt, were to stand, then an easy way would be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic, and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country, and I do not think it has any warrant in our law. Had this occurred in France, I suppose Frenchmen would have said that the age of Louis Quatorze and the practice of lettres de cachet had returned.

There remains this point. Granted that the principle of openness of justice may yield to compulsory secrecy in cases involving patrimonial interest and property, such as those affecting trade secrets, or confidential documents, may not the fear of giving evidence in public, on questions of status like the present, deter

witnesses of delicate feeling from giving testimony, and rather induce the abandonment of their just right by sensitive suitors? And may not that be a sound reason for administering justice in such cases with closed doors? For otherwise justice, it is argued, would thus be in some cases defeated. My Lords, this ground is very dangerous ground. One's experience shews that the reluctance to intrude one's private affairs upon public notice induces many citizens to forgo their just claims. It is no doubt true that many of such cases might have been brought before tribunals if only the tribunals were secret. But the concession to these feelings would, in my opinion, tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keeps us secure: and it must further be remembered that, in questions of status, society as such—of which marriage is one of the primary institutions—has also a real and grave interest as well as have the parties to the individual cause.

The cases of positive indecency remain; but they remain exactly, my Lords, where statute has put them. Rules and regulations can be framed under s. 53 by the judges to deal with gross and highly exceptional cases. Until that has been done, or until Parliament itself interferes, as it has done in recent years by the Punishment of Incest Act, and also in the Children Act, both of the year 1908, Courts of justice must stand by constitutional rule. The policy of widening the area of secrecy is always a serious one; but this is for Parliament, and those to whom the subject has been consigned by Parliament, to consider. As an instance of the watchful attention of the Legislature in regard to any possible exceptions to the rule of publicity, s. 114 of the latter Act may be referred to. It provides for the exclusion of the general public in the trial of offences contrary to decency or morality, but this exclusion is to be only during the giving of evidence of a child or young person, and under this proviso, that "nothing in this section shall authorise the exclusion of bona fide representatives of a newspaper or news agency." I may add that for myself I could hardly conceive it a likely thing that a general rule consigning a simple and inoffensive case like the present to be tried in camera could ever be made; but that is a consideration which is beyond our range as a Court administering

H. L. (E.) 1913 SCOTT v. SCOTT. Lord Shaw of Dunfermline.

the existing law. Upon the basis of that law I am humbly of opinion that the judgments of the Courts below cannot stand.

My Lords, I am relieved to think that in the opinion of all your Lordships the judgment of Bargrave Deane J. was not pronounced in a criminal cause or matter. For, notwithstanding all the discussion, I confess even yet to some inability to understand what is meant. The learned Solicitor-General, in answer to a question by me, answered from the Bar that his case implied that not only was the conduct of the appellants criminal, but that his argument demanded that he should say it was indictable. My Lords, the breach by a party of an order made against him or her in the course of a civil case is a perfectly familiar thing. Cases for breach of injunction are tried every day. But I have never yet heard that they were anything but subject to trial by the civil judges as in a civil cause or matter. And in the course of that trial it is open to the person accused of breach to establish upon the facts that what has been done was not a breach in fact, but was a legitimate and defensible action. That is precisely analogous to the present case. Mrs. Scott, for instance, maintains that, even granted that the order for hearing the case in camera was properly made, it was an order only that the trial should be conducted in camera, and that she was guilty of no violation of that order whatsoever. The proper Court to try that was undoubtedly the Court which tried the civil proceeding and made the order. As I say, my difficulty still remains of understanding how these two things can be differentiated, and what, in an infringement of patent case or the like would be notoriously a civil matter, becomes a step in a criminal cause or matter in a case like the present.

I will only add that, if the respondent's argument and the judgment of the majority of the Court of Appeal were right, this singular result would follow: In the year 1908 Parliament interposed to give a right of appeal in criminal causes. The Court of Appeal in the present case has held that no appeal lies from the judgment of Bargrave Deane J., because the decision of the learned judge is in a criminal cause or matter. Grant, accordingly, that this is so; yet, nevertheless, the Criminal Appeal Act, 1907, affords no remedy to the unfortunate appellants.

Under the argument against them they have been denied a civil appeal because their conduct was indictable, and under the Act of 1907 they can obtain no remedy by way of criminal appeal because they have not been convicted on indictment. In juggles of that kind the rights of the citizen are lost.

I concur.

Sir John Simon, S.-G., asked whether in the peculiar circumstances of this case the House would not depart from its ordinary rule and allow the appeal without costs.

EARL OF HALSBURY, in moving that the order appealed from be reversed and that the respondent do pay the costs both here and below, said that in his opinion the ordinary order should be made, but intimated that that which was most properly done by the Treasury and by the Attorney-General ought not to be at the expense of the private parties, because the judgment had established a most important principle and one which it was most important the public should have the benefit of, and therefore private individuals should not be at the expense of establishing it.

Order of the Court of Appeal reversed: the respondent to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, May 5, 1913.

Solicitors for appellants: *Braby & Waller.*

Solicitors for respondent: *Treasury Solicitor* (1); *W. S. Jerome.*

ADDENDUM.

Mr. Harold Moore, of the Divorce Registry, during the course of the hearing in the House of Lords looked up the papers in the Registry in a number of nullity cases from 1820 to 1857. In a letter to the Treasury Solicitor he stated the result of his search as follows: "The papers in cases tried in the Consistory Court of London were handed over to the Probate and Divorce Court in the last-named year and we have an index of them. My search established the fact that it was the practice to hear such suits in camera and that informal application was made to the judge or his clerk by the proctors concerned either by letter or verbally. I think I found three letters—the cases are not very numerous—and in one instance where there was no letter there was a pencil note 'to be heard in the dining hall by order of the judge.'"

(1) The Treasury Solicitor was put on the record, after the appeal was presented, to enable him to instruct counsel.

1 Wiretapping and Other Electronic Surveillance: Law and Procedure § 4:31

Wiretapping and Other Electronic Surveillance: Law and Procedure
Robert W. **Hubbard**, Mabel Lai, Daniel Sheppard

Chapter 4. Special Problems Associated with Wiretap Affidavits

VII. Affiants, Informants and Confidential Informers

§ 4:31. Confidential **Informers**

The police and the criminal justice system depend on confidential **informants** to operate. In *Application to Proceed In Camera (Re)*, [1] the Supreme Court recognized this truism. The Court said:

> Police work, and the criminal justice system as a whole, depend to some degree on the work of confidential **informers**. The law has therefore long recognized that those who choose to act as confidential **informers** must be protected from the possibility of retribution. The law's protection has been provided in the form of the **informer privilege** rule, which protects from revelation in public or in court the identity of those who give information related to criminal matters in confidence. This protection in turn encourages cooperation with the criminal justice system for future potential **informers**. [2]

The wiretap affiant who relies on confidential **informers** must walk a tightrope. The officer has a duty to protect the **informer's** identity in order to shield the **informer** from reprisals and in order to encourage other **informers** to come forward. Yet, the affiant must also reveal enough information about the **informant** that the issuing justice can be satisfied that the **informer's** information is reliable. The task of enhancing the **informer's** reliability while simultaneously protecting his or her identity may be difficult. [3]

In *R. v. Warsame*, [4] the appellant complained about the lack of detail in the ITO about the **informants**. In dismissing the appeal, the Court of Appeal for Alberta stated:

> Relying on information received from **informants** creates a tension between protecting the **informer privilege** and the right of the accused to make full answer and defence. The Crown, the police and the court have no ability to waive the **informer privilege**, which must be studiously protected: … *Being too precise about the source of the **informants'** information, or providing too much detail about their criminal records, might well expose their identity. The **informant privilege** can only be compromised when it is absolutely essential because innocence is at stake:* … The appellant has not demonstrated that merely attempting to undermine the credibility of the **informants**, so as to undermine the foundation of the warrant, meets that test: … Accordingly, any gaps in the information provided about the **informants** did not preclude the issuance of the warrant. [5]

The trial judge in *R. v. Chui* [6] identified the dangerous balance between providing relevant disclosure and safeguarding the identity of **informers**. He said:

> *The defence firstly seeks to know whether Confidential **Informers** A and B have criminal records for crimes of dishonesty.* It is relevant that an accused know whether an **informer** providing information to the police might be challenged as to credibility and reliability because of a proven history of dishonesty. However, *utmost caution must be exercised that divulging such information will not tend to provide any information that will identify the **informer**.*

> I determine *that limited disclosure from the Crown to defence counsel can satisfy these two competing principles by simply advising: "Confidential **Informers** A and B do/do not have criminal records for crimes of dishonesty", or perhaps "Confidential **Informer** ___ does not have a criminal record for crimes of dishonesty, but Confidential **Informer** ___ does have such a record".* Any more information, for example as to which specific crimes of dishonesty may have been committed by which confidential **informer**, or any dates, times, places, or circumstances, may tend to provide evidence which may, when taken together with the evidence that may be in possession of the accused or may be otherwise available, identify those **informers**.

The same logic and determination applies to the second request of the defence, whether Confidential **Informer** B has a compensation history and has been compensated frequently for information … As a result, *the Crown shall answer only the very specific question about compensation history by saying "Confidential **Informer** B has/has not a compensation history" and if the former, "and has been/not been compensated frequently for information".* Determination of whether any compensation to Confidential **Informer** B is considered "frequent" will be left to Crown counsel's discretion. Once again, further information would risk the possibility of identification of the **informer**. [7]

In *R. v. Leipert*, [8] the court reiterated the long-standing rule of public policy which grants true **informers** absolute **privilege** against the revelation of their identities, subject to one exception: where innocence is at stake. Once **informer privilege** has been established, the court is duty bound to apply the protection of the rule. In *Application to Proceed In Camera (Re)*, [9] the Supreme Court reiterated the broad ambit of the **informer privilege** rule. The Court held:

> *Once it has been established that the **privilege** exists, the court is bound to apply the rule. It is the non-discretionary nature of the **informer privilege** rule which explains that the rule is referred to as "absolute"*: see R.W. **Hubbard**, S. Magotiaux and S.M. Duncan, The Law of **Privilege** in Canada (loose-leaf), at p. 2–7. The Crown has a similar obligation: the **privilege** is "owned" by both the Crown and the **informer** himself, so the Crown has no right to disclose the **informer's** identity: *Leipert*, at para. 15.
>
> …
>
> Moreover, *the **informer** himself or herself cannot unilaterally decide to "waive" the **privilege***. The authors of The Law of Evidence in Canada write, at p. 883, that "*[t]he **privilege** belongs to both the Crown and the **informer** and thus the **informer** alone cannot 'waive' the **privilege*** and neither can a party to a civil proceeding": J. Sopinka, S. N. Lederman and A.W. Bryant, The Law of Evidence in Canada (2nd ed. 1999) (emphasis in original). Courts in the United Kingdom have found that a court may refuse to disclose an **informer's** identity even if he or she has explicitly requested disclosure: see *Powell v. Chief Constable of North Wales Constabulary*, [1999] E.W.J. 6844 (QL) (C.A.), and *Savage v. Chief Constable of Hampshire*, [1997] 1 W.L.R. 1061 (C.A.).
>
> *In addition to its absolute non-discretionary nature, the rule is extremely broad in its application. The rule applies to the identity [page16] of every **informer**: it applies when the **informer** is not present, where the **informer** is present, and even where the **informer** himself or herself is a witness. It applies to both documentary evidence and oral testimony*: Sopinka, Lederman and Bryant, at pp. 882–83. It applies in criminal and civil trials. *The duty imposed to keep an **informer's** identity confidential applies to the police, to the Crown, to attorneys and to judges*: **Hubbard**, Magotiaux and Duncan, at p. 2-2. The rule's protection is also broad in its coverage. *Any information which might tend to identify an **informer** is protected by the **privilege**. Thus the protection is not limited simply to the **informer's** name, but extends to any information that might lead to identification.*
>
> *The **informer privilege** rule admits but one exception: it can be abridged if necessary to establish innocence in a criminal trial* (there are no exceptions to the rule in civil proceedings). According to the innocence at stake exception, "*there must be a basis on the evidence for concluding that disclosure of the **informer's** identity is*

necessary to demonstrate the innocence of the accused": *Leipert*, at para. 21. It stands to be emphasized that *the exception will apply only if there is an evidentiary basis for the conclusion; mere speculation will not suffice*: Sopinka, Lederman and Bryant, at p. 884. The exception applies only where disclosure of the **informer's** identity is the only way that the accused can establish innocence: *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32, 162 C.C.C. (3d) 257, 210 D.L.R. (4th) 341, at para. 4.

> In this Court's decision in *Leipert*, it was clearly established that *innocence at stake is the only exception to the **informer privilege** rule. The rule does not allow an exception for the right to make full answer and defence. Nor does the rule allow an exception for disclosure under R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1. Indeed, the Court's decision in *Leipert* suggests, at para. 24, that an absolute **informer privilege** rule, subject only to the innocence at stake exception, is consistent with the Charter's provisions dealing with trial rights:

...

> In conclusion, *the general rationale for the **informer privilege** rule requires a **privilege** which is extremely broad and powerful. Once a trial judge is satisfied that the **privilege** exists, a complete and total bar on any disclosure of the **informer's** identity applies. Outside the innocence at stake exception, the rule's protection is absolute.* No case-by-case weighing of the justification for the **privilege** is permitted. *All information which might tend to identify the **informer** is protected by the **privilege**, and neither the Crown nor the court has any discretion to disclose this information in any proceeding, at any time.* [10]

In *R. v. Basi*, [11] in relation to **informer privilege**, the Supreme Court summarized its pronouncements in *Application to Proceed In Camera (Re)*, [12] as follows:

> The **privilege** arises where a police officer, in the course of an investigation, guarantees protection and confidentiality to a prospective **informer** in exchange for useful information that would otherwise be difficult or impossible to obtain. In appropriate circumstances, a bargain of this sort has long been accepted as an indispensable tool in the detection, prevention and prosecution of crime.

The **informer privilege** has been described as "nearly absolute". As mentioned earlier, it is safeguarded by a protective veil that will be lifted by judicial order only when the innocence of the accused is demonstrably at stake. Moreover, while a court can adopt discretionary measures to protect the identity of the **informer**, the **privilege** itself is "a matter beyond the discretion of a trial judge." (*Named Person*, at para. 19).

> Whenever **informer privilege** is claimed, or the court of its own motion considers that the **privilege** appears to arise, its existence must be determined by the court *in camera* at a "first stage" hearing. Even the existence of the claim cannot be publicly disclosed. Ordinarily, only the putative **informant** and the Crown may appear before the judge. In *Named Person*, however, the Court considered that an *amicus curiae* may be necessary or appropriate, particularly where the interests of the **informant** and the Crown are aligned: *Named Person*, at para. 48.
>
> In determining whether the **privilege** exists, the judge must be satisfied, on a balance of probabilities, that the individual concerned is indeed a confidential **informant**. And if the claim of **privilege** is established, the judge must give it full effect. As we have seen, *Named Person* established that trial judges have no discretion to do otherwise.

Finally, the **informer privilege** belongs jointly to the Crown and to the **informant**. Neither can waive it without the consent of the other. [13]

In *R. v. Brassington*, [14] police officers who were charged sought to tell their lawyers about **informers** they knew, stemming from their duties as police officers. There was no suggestion that the **informers** were witnesses against them. Indeed, the **informers** were not witnesses. There was also no suggestion that the defence could establish the innocence at stake exception. The defence simply alleged that there was an unfettered right by the accused to tell their lawyers about **informers** because solicitor client **privilege** would in any event protect the information from further disclosure. The Supreme Court concluded:

> Our jurisprudence prevents piercing **informer privilege** unless the accused can show that his or her innocence is at stake. I see no basis for departing from that rule when the accused is a police officer. No evidence of "innocence at stake" was presented. The police officers are therefore not entitled to disclose the information to their lawyers. [15]

In dismissing the defence arguments, the Supreme Court re-emphasized the absolute nature of **informer privilege** and the stringent nature of the innocence at stake exception. The Court stated:

> **Informer privilege** arises in circumstances where police receive information under a promise of confidentiality. Such a promise can be explicit, or can arise implicitly from police conduct that would "have led a person in the shoes of the potential **informer** to believe, on reasonable grounds, that his or her identity would be protected" (*R. v. Named Person B*, [2013] 1 S.C.R. 405, at para. 18). **Informers** are entitled to rely on the promises that police officers make to them because they are otherwise at serious risk of potential personal danger if their cooperation becomes known (*Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, at para. 16). And "[w]hen it is known in the community that an individual's identity is **privileged** if he or she provides confidential information to the police, others may come forward" (**Hubbard**, Magotiaux and Duncan, at p. 2-2).
>
> This Court recently summarized the rule in *R. v. Durham Regional Crime Stoppers Inc.*, [2017] 2 S.C.R. 157, where Moldaver J. said:
>
> > The **informer privilege** rule is a common law rule of long standing — and it is fundamentally important to the criminal justice system. **Informers** play a critical role in law enforcement by providing police with information that is otherwise difficult or impossible to obtain. By protecting the identity of individuals who supply information to the police — and encouraging others to do the same — **informer privilege** greatly assists the police in the investigation of crime and the protection of the public. Subject to the innocence at stake exception, the **privilege** acts as a complete bar on the disclosure of the **informer's** identity, and the police, the Crown and the courts are bound to uphold it. [para. 1]
>
> The standard for piercing **informer privilege** — the "innocence at stake" test — is, accordingly, onerous. The test was set out by this Court in *McClure.* The "**privilege** should be infringed only where core issues going to the guilt of the accused are involved and there is a genuine risk of a wrongful conviction" (*McClure*, at para. 47). The *McClure* application is typically made at the close of the Crown's case so courts only consider piercing **informer privilege** when strictly necessary (*R. v. Brown*, [2002] 2 S.C.R. 185, at para. 52). There are no other exceptions to **informer privilege** (*Vancouver Sun*, at para. 28; *R. v. Leipert*, [1997] 1 S.C.R. 281). It is "not something that allows for weighing on a case-by-case basis the maintenance or scope of the **privilege** depending on what risks the **informer** might face" (*Vancouver Sun*, at paras. 19 and 22). [16]

The Court in *R. v. Brassington* [17] reiterated its conclusion in *Basi* that defence lawyers cannot be part of the circle of **privilege**. The Court said:

> Resolving this issue therefore requires consideration of who falls within the "circle" of **informer privilege** — the group of people who are entitled to access information covered by **informer privilege** and who are bound by it. Traditionally, this circle is tightly defined and has only included the confidential **informer** himself or herself, the police, the Crown and the court (*R. v. Barros*, [2011]

> 3 S.C.R. 368, at para. 37). If defence counsel can be brought into the circle, then the "innocence at stake" paradigm does not apply. If they cannot, it does.

I agree with the Crown that the "innocence at stake" paradigm applies because defence counsel are outside the "circle of **privilege**". In *Basi*, Fish J., for the Court, confirmed that defence counsel are not bound by **informer privilege** and are "outside the circle". He held that permitting defence counsel to have access to **informer-privileged** information subject to an undertaking that they would not disclose the information to their clients would be improper, since "[n]o one outside the circle of **privilege** may access information over which the **privilege** has been claimed until a judge has determined that the **privilege** does not exist or that an exception applies" (para. 44). [18]

In *Iser v. Canada (Attorney General)*, [19] a prison inmate sued prison officials for injuries occurring while in their care. A dispute arose concerning whether documents sought in discovery were properly redacted with **informer privilege** in mind. The Court of Appeal for British Columbia accepted the following seven principles set out by the Chambers judge as correct:

> 1) **Informant privilege** is an absolute, non-discretionary rule preventing disclosure of any information that may compromise the **informant's** identify.
>
> 2) It is of such importance that when it applies, the Court is not entitled to engage in any type of balancing or weighing of interests.

3) The rule is extremely broad in its application, as described in Named Person v. Vancouver Sun, 2007 SCC 43, at para. 26:

> … The rule applies to the identity of every **informer**: it applies where the **informer** is not present, where the **informer** is present, and even where the **informer** himself or herself is a witness. It applies to both documentary evidence and oral testimony: Sopinka, Lederman and Bryant, [The Law of Evidence in Canada, 2nd ed., Toronto: Butterworths, 1999] at pp. 882–83. **It applies in criminal and civil trials. The duty imposed to keep an informer's identity confidential applies to the police, to the Crown, to attorneys and to judges: Hubbard, Magotiaux and Duncan**, [The Law of **Privilege** in Canada, Aurora, Ont.: Canada Law Book, 2006 (loose-leaf updated 2007, release 3)] at p. 2-2. The rule's protection is also broad in its coverage. Any information which might tend to identify an **informer** is protected by the **privilege**. Thus the protection is not limited simply to the **informer's** name, but extends to any information that might lead to identification. [emphasis by the chambers judge]

4) Justice Binnie in R. v. Barros, 2011 SCC 51 at para. 30 explains that allowing any flexibility in the rule by permitting individual trial judges to have discretion would "rob **informers** of that assurance and sap their willingness to cooperate". The only qualification to the sanctity of the **privilege** is where an accused's innocence is at stake.

> 5) The **privilege** belongs jointly to the **informant** and the official with whom he or she has a confidential relationship and it cannot be waived unilaterally.
>
> 6) No one outside the "circle of **privilege**" can access the information unless a court rules that the **privilege** has not been established, or the innocence at stake exception applies. That "circle of **privilege**" is comprised of the **informant**, the police (or other official with whom the **informant** has a confidential relationship), crown counsel and judges. Even defence counsel who undertook not to disclose any information to anyone, including to their clients are excluded: R. v. Basi, [2009] 3 S.C.R. 389 at para. 44.

> 7) The Court should not second guess the police and Crown counsel on the issue of whether someone's life or safety will be compromised by revealing information: R. v. Sahid, 2011 ONSC 979 at para. 16 …

> … *The chambers judge's 7-point summary of* ***informer privilege*** *was accurate.* For the purposes of this case, *I would only add that there are two important pre-conditions to the existence of confidential* ***informer privilege****.* First, *the confidential* ***informer*** *must have provided information to an investigating authority. That authority is usually the police, but, as the chambers judge noted, information given to prison authorities is also covered by the* ***privilege****. Second, the confidential* ***informer*** *must have provided the information under an express or implied guarantee of protection and confidentiality*: see *R. v. Barros* at para. 31. [20]

Informer privilege extends beyond information which *will* identify the **informant** to information which *might* identify the **informant**. The *possibility* of identification is, in and of itself, sufficient to engage the **privilege**. As *Leipert* acknowledged: "**Informer privilege** prevents not only disclosure of the name of the **informant**, but of any information which might implicitly reveal his or her identity". [21]

Great care must be taken to protect even anonymous **informants** because it is difficult to predict what information, once disclosed, could reveal the identity of the **informant**. *Leipert* stressed:

> A detail as innocuous as the time of the telephone call may be sufficient to permit identification. In such circumstances, courts must exercise great care not to unwittingly deprive **informers** of the **privilege** which the law accords to them. [22]

The rule protecting **informers** does not encompass a duty to physically protect an **informer**. In *United States of America v. Odale*, [23] a fugitive resisted extradition for her crimes on the basis that she was an **informer** for the American police and would be in danger if extradited. In rejecting this contention, the court held:

> … *She asserts that the law of police* ***informer privilege*** *in Canada applies and its scope requires that the Minister and Canadian law enforcement provide her with that protection.* Their protection of her requires the US to provide assurances that they are willing to provide protection to Ms. Odale on her return.

> *This argument must fail.* First, *if Ms. Odale can be characterized as a police* ***informant*** *in Canada or in the US, we do not see the scope of the protection afforded thereunder to be as broad as that suggested. The scope of the* ***privilege*** *does not extend to providing protection to guard or ensure the* ***informant's*** *physical security forever and wherever.*

> *The case law on* ***informer privilege*** *has consistently held that the* ***privilege*** *protects the identity of the* ***informer****.* See *R. v. Hunter*, (1987), 59 OR (2d) 364. Subsequent Supreme Court decisions have found that, while the scope of the **privilege** is broad in various respects, and subject to only one exception (where innocence is at stake), *it is nevertheless a* ***privilege*** *that relates to the revelation of information that could identify the* ***informer****.* See *R. v. Leipert*, [1997] 1 SCR 281. In *Named Person v. Vancouver Sun*, 2007 SCC 43 at para 16, [2007] 3 SCR 253, Bastarche J commented that the law has "long recognized that those who choose to act as confidential **informers** must be protected from the possibility of retribution. *The law's protection has been provided in the form of the* ***informer privilege*** *rule, which protects from revelation in public or in court of the identity of those who give information related to criminal matters in confidence*". See also, *R. v. Scott*, [1990] 3 SCR 979, [1990] S.C.J. No. 132; *R. v. Durette*, [1994] 1 SCR 469, 70 OAC 1.

> While the courts have repeatedly affirmed that **informer privilege** was developed in part to protect **informers**, *there is no authority to support a proposition that the duty extends to the physical protection of people who assist in law enforcement.* [24]

The *Odale* decision does not preclude **informers** from seeking and obtaining protection. It simply underscores that the **informer privilege** rule does not *itself* encompass the duty to protect. The duty to protect, when warranted, may simply arise from the common law duty of the police to protect the life and safety of citizens. [25] The *Odale* court said:

> *Ms. Odale also submitted that her life was in danger because the information she shared was about outlaw motorcycle gangs including one that her abusive husband belongs to.* She believes he or they will kill her if her cooperation with authorities becomes known. Again, the record reflects inquiries by the IAG as to whether Ms. Odale had expressed security concerns. The response was that she had in fact done so but had provided no details. *The Minister concluded on this record that if surrendered Ms. Odale would have the opportunity to request protection from the US while in custody. Accordingly, he was unable to conclude that on this basis it would be unjust to surrender her. That conclusion can be supported on this record.*
>
> Ms. Odale also submitted that having been in an abusive marriage would make her surrender unjust or contrary to the principles of fundamental justice. *Again the Minister concluded that there was no reason to believe that the US would not be in a position to provide adequate protection should they conclude it was warranted or necessary.* [26]

If **informants** are to be afforded effective protection, non-disclosure of identifying details must be carefully guarded. Even the slightest **breach** of **privileged** information may not only endanger an **informant's** life but also significantly erode the trust of other members of the community who might contemplate providing information to the police.

In *Nissen v. Durham Regional Police Services Board*, [27] the Court upheld a claim of civil damages against the police for disclosing information that it promised to keep confidential. The police tried to justify their **breach** by arguing that similar information had come to them from other sources and, in any event, the **informant** was wrong to fear for their safety. In rejecting this argument, the Court underscored the nature of the obligation on the police to maintain confidentiality once a promise of confidentiality had been made. The Court stated:

> … this is a civil case between the police and an individual who was promised confidentiality … Her right was not contingent upon other ways the Police may have had to get the information she provided, or on what the Police thought about the danger she faced.
>
> …
>
> It is, of course, for the police to decide whether or not to make a promise of confidentiality. In making that decision, they will no doubt make an assessment of the value of the information the witness may have to offer, whether they can get the information through other means, and the danger the witness may face if his or her identity is revealed. If the police tell the witness that they will not reveal his or her identity or involvement in order to get information, they should keep their promise, or face the ordinary **consequences** of violating the assurance they have given. If the police decide that the witness does not deserve or warrant the requested assurance of confidentiality and anonymity, they should clearly say so and refuse to give the witness the requested assurance. That would allow the witness to decide whether to nonetheless give the information and accept the risk of disclosure. Simply put, a citizen in Ms. Stack's situation should be able to rely upon what the police tell her. [28]

In *R. v. McEwen*, [29] the court refused to provide the defence disclosure of further details of two confidential sources. The court appreciated the significance of releasing seemingly innocuous details of the **informants**' background as follows:

> *If there are a handful of people who would be in a position of knowing the information that could be provided to the police, and out of that handful of people*, if one has no criminal record and the rest do have records and it is disclosed that the **informant** doesn't have a criminal record, it would be pretty clear who the **informant** was. So even identifying whether someone does or doesn't have a criminal record could potentially disclose the identity of the **informant**.
>
> ...
>
> > The problem with the coded sources is — I think that is even easier to address. *If someone has given over a hundred times information to the police, and their coded number is on a hundred reports, it wouldn't take long to figure out what individual might have been present in multiple fact patterns*, and it could easily lead to the identity of the source.
>
> *Altogether, the **informant privilege** is such that I find that it trumps defence counsel's request for disclosure of the criminal records and identification numbers of coded sources.* Therefore, the application of defence for disclosure of these documents or this information is dismissed. [30]

It is axiomatic that the danger of narrowing a pool is more pronounced in smaller communities. If the community has a small population, the pool of likely **informers** is already narrow. Providing details concerning the source of knowledge of an **informant** referenced in materials supporting a search authorization in such circumstances may narrow the pool even further. [31]

In *R. v. Shier*, [32] officers testifying at the trial had been cautioned about testifying in any way that might narrow the pool of potential **informers**. The defence complained of the prosecution's coaching of witnesses with the safety of the **informant** in mind. The accused had claimed entrapment in relation to his attempt to hire an undercover police officer to kill a former partner. The police decision to approach the accused with a pretend hit man rested in part on a confidential **informer's** tip. In dismissing the complainants of the Crown's coaching of witnesses regarding revealing too much information about **informants**, the trial judge held:

> In my view, there was nothing improper in the Crown's conduct. The Crown is routinely tasked with vetting and editing disclosure in order to protect the identity of confidential **informers**. In this regard, the Crown regularly meets with police officers to assess how much information can be disclosed without risking identification of the source. The language used to disclose information is often modified in order to avoid "narrowing the pool" and potentially identifying a source. To give one common example, gender neutral pronouns are substituted so as to avoid identifying the gender of the **informer**. More generally, information received from a confidential source is routinely packaged and presented in summary form, as opposed to verbatim in search warrant and wiretap affidavits.
>
> The Crown and/or police might be faulted if they conveyed to the defence and/or the court the impression that the information disclosed/tendered was verbatim as opposed to a summary of what was conveyed by the **informant**. However, that is not the case here. The defence was not misled by what occurred. While I accept that the use of a summary to convey the information provided by the **informant** can be potentially problematic because the defence has no way of testing the accuracy of the summary, in most cases the Crown's obligations to the court will insure that the process is not misused. Moreover, the defence is always free to ask the court to review a summary or edit to ensure that it accurately conveys as much information as possible without revealing the identity of the **informant**, see: *R. v. Durette* 1992 CanLII 2779 (Ont.C.A.) per Doherty J.A. in dissent. [33]

Information that might narrow the pool of possible **informers** may include information about his handler. In *R. v. Petraitis*, [34] **informer** information had inadvertently been revealed. In deciding whether the information could be utilized by the defence,

the Crown called the handler to testify that the information was irrelevant to the case.[35] The Crown asked that the handler be permitted to testify under a pseudonym because the size of his police unit might narrow the pool of **informers** that he was dealing with. In agreeing to this request, the trial judge explained as follows:

> The Crown requested that the CI's handler be permitted to testify under a pseudonym, on the basis that the small size of the police unit in which he is employed and the small size of the community in which he works might, taken together with other factors, tend to identify the CI. No objection was taken to the Crown's suggestion; on behalf of the applicant, Mr. Lacey acknowledged that such an approach is sometimes required and that there is ample precedent for it. Understanding that the parties all recognized that the witness was a police officer, that his real name is a matter of record in his sealed affidavit, and that his identity does not bear on the central issue of whether the information he received is **privileged**, I ruled that the witness could testify under the pseudonym, "John Doe".
>
> Over the objection of the defence, the handler's evidence was taken *ex parte*, following which applicant's counsel was given a judicial summary of his testimony and a redacted copy of the transcript of the *ex parte* submissions that followed his evidence. That summary reveals the following facts.
>
> The handler identified the police service by whom he is employed and the location and nature of his current assignment. He confirmed the rationale advanced by the Crown for having him testifying under a pseudonym, namely, that the community in which he works is very small and has a limited number of officers working in it and, further, that revelation of that information might tend to reveal the identity of the CI.[36]

R. v. Petraitis[37] underlines that editing aimed at protecting **informers** should be done carefully. In *R. v. Petraitis*,[38] the officer blacked out **informer** information but when the material was copied, the blacked out material was readable. In similar situations, the confidential material is simply not caught before being disclosed. The inadvertently disclosed material is then sought to be recovered. The problem posed by inadvertent disclosure is covered in section 2.100.110 of the *Law of **Privilege** in Canada.*[39]

Because of safety concerns for **informants**, police officers frequently hesitate to provide full details about them in materials aimed at obtaining an authorization. This can lead to serious problems, including:

(1) There may be insufficient details about the source of the information in the affidavit to permit the issuing justice to properly assess the reliability of the information. This may lead the justice to discount the information and refuse to give it any credence.

(2) Insufficient information about the **informant** may ultimately lead to a finding on review of the authorization at trial that, if the issuing justice had been provided with more adequate information, the wiretap order would not have issued.

(3) Because the credibility of the affiant and the **informant** are closely linked, if the **informant** is not credible and it is established that the affiant *knew* this, the affiant's veracity will also be impugned.

In *R. v. Lucas*,[40] an **informant** handler testified that he had purposely kept information concerning the identity of the **informer** from the affiant of a wiretap affidavit. The trial judge made adverse comments about this practice. He stated:

> *There was an acknowledgement by the officer handling **informant** #2 during the course of his cross-examination that he was purposely vague in some respects as to the manner in which he provided information for the ITO from **informant** #2 because of concerns over past failures by other Crown counsel to ensure that the identities of **informers** were protected during the course of the disclosure process.* That concern is both real and legitimate. Disclosure errors that underlie this concern are also, unfortunately, too recurrent. They occurred in this very case. Nevertheless, *the officer's response to this problem is, at the same time, disturbing.* In order to protect the integrity of the authorization process and the overarching requirement that full, fair and frank disclosure be

> made to the authorizing judge, *individual officers cannot engage in their own vetting processes.* While there is no reason to believe that this approach had any negative effect on the state of the information provided in this case, *such presumptive screening has the potential to seriously undermine the established and necessary principles surrounding the application process.* [41]

It was not always the practice that police officers trusted others with information that could identify **informers**. Now that the law concerning **informer privilege** has made it clear that **informer privilege** is almost absolute, the police have adapted their practices to meet the new reality. Historically, the police records of confidential **informers** were not always fully set out in ITOs with the view to redacting this material as part of the tear away package not to be disclosed, if charges were eventually laid. Now, however, there is a greater acceptance that such information can be revealed to judicial officers. The trial judge in *R. v. Greaves-Bissesarsingh* [42] disapproved of an officer's reluctance to full disclose a criminal records check in his ITO. The trial judge said:

> *The Crown* then *called D.C. Ceresoli to explain that he had always followed the practice of not including an **informant's** criminal record in search warrant Informations, in order to protect the **informer's** identity, but that he had recently changed this practice and now includes the full criminal record.* He changed his practice because he believed that the law had evolved to the point where this greater degree of disclosure was required. In this regard, I note that the decision in *R. v. Rocha*, *supra* was released on October 24, 2012, some seven and a half months after D.C. Ceresoli applied for the search warrant in this case. As noted previously, I was satisfied with D.C. Ceresoli's honesty and integrity and this was the only poorly drafted passage in his Information. Nevertheless, *his prior practice of not disclosing the full results of the criminal records check to the Justice of the Peace was unreasonable, in my view.* [43]

The affiant in *R. v. Brown* similarly did not have the benefit of the guidance in *R. v. Rocha* when he drafted his ITO and did not disclose the full criminal record of the confidential **informer**. In cross-examination, the affiant candidly acknowledged that the language he used in the ITO was no longer acceptable. Further, the Step Six jurisprudence was at a relatively early stage when the application was decided. The Crown acknowledged that the affiant's language was “sloppy” and that there were “embarrassing” shortcomings in the ITO, but argued that trial judge was alive to these shortcomings and reasonably concluded that the warrant could have properly issued. In dismissing Mr. Brown's appeal, the Ontario Court of Appeal accepted the Crown's argument: [44]

> [T]he trial judge was alive to the shortcomings in the ITO, and appropriately recognized that some of them were attributable to the lack of judicial guidance at the time of its preparation. The trial judge applied the Debot factors and did not find that the shortcomings reflected a deliberate attempt by the police to mislead the authorizing justice. The trial judge concluded that the information in the ITO was credible, compelling, and corroborated. The trial judge's reasons demonstrate no misunderstanding of the evidence and no error of law. The trial judge's decision is entitled to deference.

R. v. McKay [45] noted the advantage of pre-edited materials. The Court of Appeal said:

> The Court in *Garofoli* reviewed in detail the care necessary in editing these materials so as to maximize accountability and accessibility while protecting the identity of **informers**. As the Court noted in *Pires* and *Lising* at para. 25, access to the material before the authorizing judge is granted on the simple assertion that the admissibility of the evidence is challenged. Since the accused has a right to see as much of that material as possible, *ITOs are drafted knowing they will be reviewed by the authorizing judge and disclosed to the defence. This is one reason why ITOs can be routinely edited without the same level of risk inherent in editing raw **informer** materials.* [46]

R. v. Vigneswaralingam [47] described a common approach to editing of ITOs filed in support of search warrants as follows:

> … It is common today for most properly trained police affiants to prepare warrant applications with a "tear away" appendix (or appendices) detailing fulsome information concerning CHS. In this manner the CHS information is comprehensively addressed in an attached appendix in furtherance of the affiant's duty to provide full frank and fair disclosure to the issuing justice. Given the affiant has a positive duty to ensure that nothing that might serve to identify the CHS is revealed, it is often stipulated that disclosing the appendix would serve to identify the CHS. The affiant typically requests that the CHS appendix be sealed by court order for the purpose of preserving **informant privilege**. [48]

In *R. v. Pilbeam*, [49] the Manitoba Court of Appeal recognized the modern reality that officers must reveal more information about their **informers** than previously, for with the use of tear aways that are part of the ITOs but are not disclosed to the defence, judges expect more information about the confidential **informers** referenced in ITOs. The Court stated:

> The state of the law after many years of litigation about the treatment of **informant** information in a *Garofoli* review boils down to the simple reality that the state cannot have its cake and eat it too in matters such as this. *The authorising judge or justice is part of the "circle" of* ***informant privilege*** (*R v Brassington*, 2018 SCC 37 at para 41; see also *R v Barros*, 2011 SCC 51 at para 37). *They are entitled to access the information and are legally obligated to safeguard it* (see *R v Y (X)*, 2011 ONCA 259 at para 1).

If the police make the choice to pursue prior judicial authorisation to conduct an investigative search based on information from a confidential ***informant****, the* ***consequence*** *is that the material information about or from the confidential* ***informant*** *must be disclosed to the authorising judge or justice.* The obligation of making full, fast and frank disclosure requires that the authorising judge or justice knows the "true state of affairs" (*R v Thomson (K), Thomson (R), Hately (S), Farrington, Guilbride, Hately (J) and Goyer*, 2006 BCCA 392 at para 50). *There is no good reason that that should not occur because the procedure described in Garofoli (see p 1461) is designed to reconcile the interests of law enforcement, the protection of* ***informers*** *and the accused's right to make full answer and defence* (see *R v Crevier*, 2015 ONCA 619 at paras 41–90).

…

… [W]hat the Courts expect is that any information that may tend to identify a confidential ***informer*** *be protected in an ITO in such a way that maximises "accountability and accessibility"* (*R v McKay*, 2016 BCCA 391 at para 150). This means that *all of the material information about or from the confidential* ***informant*** *relevant to the statutory pre-conditions to issue a search warrant needs to be disclosed, unedited, to the authorising judge or justice and, later, after input is sought from the police by the Crown, a redacted version of the ITO will be disclosed to the defence upon request.* The failure of the police to follow such an approach is not grounds by itself for a successful challenge to a search warrant, but likely will invite such a challenge given what is typically expected of the police. [50]

The trial judge in *R. v. Daniels* [51] also adversely commented on the failure of the affiant to disclose details of the confidential **informant** in the tear away portion of the Information to Obtain. He said:

> *The Crown has conceded that the confidential* ***informant*** *has a criminal record* that includes convictions for "property offence(s)," for "offence(s) against the administration of justice," "driving offence(s)" and "obstruct." *The Crown has also conceded that this criminal record was "not placed before the authorizing justice."*

…

Relatively recently, in *R. v. Boussoulas*, 2014 ONSC 5542, at para. 46, I made the following suggestion as to how an affiant might best include such information in an ITO:

> *In cases in which a confidential **informant** has a criminal record, the affiant should include all of the usual details of that record (i.e. dates and locations of convictions, offences committed, and sentences imposed) in the ITO. This can be easily accomplished by simply referring to the existence of the record in the ITO and appending a copy of the record as an appendix.* Such an approach has much to commend it. *Such an approach would allow the justice reviewing the ITO to see all of the details of the criminal record and use it to properly assess its impact upon the credibility of the confidential **informant**.* Such an approach would also avoid subsequent complaints and litigation about the accuracy of the manner in which the affiant elected to characterize or summarize the record.

*[T]he affiant provided no details whatsoever as to the nature of the criminal record possessed by the confidential **informant**.* In the redacted ITO, the affiant indicated only that the **informant** is "well entrenched in the drug sub-culture," is "familiar with drug activity and persons involved in drug dealing," and is "known by an FPS and MTP number." While some of these statements suggest that the confidential **informant** may well have been engaged in drug-related criminal activities, none of these statements clearly informed the justice about the existence and details of the confidential **informant's** criminal record. *Given the apparent nature of the criminal record possessed by the confidential **informant**, as now summarized by the Crown, in my view the affiant was duty-bound to disclose the existence and some of the key details of that criminal record in the ITO (if the affiant was aware of this criminal record), as part of the general legal obligation on affiants to make full, fair and frank disclosure on such ex parte search warrant applications.* See *R. v. Araujo*, at paras. 46–47; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S. C.R. 253, at para. 58. [52]

In the same case, the trial judge suggested that it would be preferable when drafting affidavits relying on untested **informants** that the affiant highlight this fact. He stated:

> As a matter of drafting practice, *it might well be preferable, when reliance is being placed upon information from a "first time" confidential **informant**, with no known history (reliable or not) of providing information to the police, for an affiant to expressly include an unequivocal statement to that effect in the ITO.* See *R. v. Henry*, 2012 ONSC 251, [2012] O.J. No. 1267, at paras. 32, 36. *By including such a statement in the ITO, the "first time" status of the confidential **informant** would be clearly highlighted for consideration of the reviewing justice.* However, the absence of such an express statement in the ITO provides no justification for cross-examination of the affiant, at least not in the circumstances of the present case. As A.J. O'Marra J. stated in *R. v. Ali* (unreported, Ont.S. C.J., March 6, 2014), at p. 16, in similar circumstances, the affiant did not in any way mislead the issuing justice by failing to expressly note that the confidential **informant** was providing information to the police for the "first time," especially as the absence of any "prior history" as an **informant** is a "neutral fact" in the overall assessment of the reliability of the **informant**. [53]

Other cases that have dealt with the alleged failure to properly reference the **informant's** criminal record include the following:

1. ***R. v. Bahlawan***: [54] In dismissing the attack on the sufficiency of the attack on an ITO that relied upon **informants**, the *Garofoli* judge made the following comments about the way that the criminal records of the **informers** had been disclosed in the ITO:

> > With respect to the **informers**' criminal records, the ITO stated that the Affiant had conducted background checks on each of the **informers** and, if they had a criminal record, had disclosed information about it to the issuing judge in a confidential appendix. *In the case of CI #1, the Affiant provided the judge with the "essential context" of any criminal record.* In the case of CI #2, the judge was provided with the criminal record itself, if any.
>
> *In my view, it would have been preferable for the Affiant to disclose CI #1's full criminal record to the issuing judge, or to at least explain in the ITO why he did not do so.*

> A confidential **informer's** criminal record is however just one element among many that a judge might consider in assessing whether their tips provide a sufficient basis for a warrant or are nothing more than "mere rumour or gossip". These elements, as indicated earlier, include considering whether the tip provides meaningful detail, whether the **informer** discloses the source of or means of their knowledge and whether there are indicia of their reliability, "such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance". [55]

The task of protecting **informants** is not confined to police officers, for prosecutors and judges share the obligation. *Leipert* underlined that "the *Crown and* the *court* are bound not to reveal the undisclosed **informant's** identity." [56] A court has no discretion with regard to **informer privilege**; "the duty of a court not to **breach** the **privilege** is of the same nature as the duty of the police or the Crown". [57] Because judges share the burden of protecting confidential **informers**, revealing the identity of the **informer**, directly or indirectly, in the materials that the judge examines should not be problematic. What is problematic is ensuring that, before the material is disclosed to the defence or other third parties, all information that tends to reveal the identity of **informers** is properly redacted from the disclosed materials. In effect, therefore, the problem posed in protecting confidential **informers** revolves largely around carefully editing of the materials supporting the wiretap order. As set out in § 5:26, [58] if the affiant drafts the affidavit in the first instance with editing in mind, by using appendices containing all of the "**privileged**" material that must be removed before disclosure is provided, secrecy should be properly maintained. A pre-editing of the affidavit assists in meeting two ends: providing sufficient information to enable the issuing judge to determine for him or herself the reliability of the **informer** and isolating the confidential information that must be protected from subsequent disclosure.

Crown attorneys and police officers who violate their duty to protect **informers** may be liable to civil suit and damages. In *Nissen v. Durham (Regional) Police Services Board*, [59] the court awarded damages for a **breach** of the duty. The court held:

> In a criminal law context, "**informer**" **privilege** is almost absolute. What this means is that a person who provides information to police about actual or suspected criminal activity, in exchange for a promise of anonymity, is guaranteed that anonymity will be preserved. It is only where innocence is at stake that the **privilege** must give way. In any litigation, whether civil or criminal, the police, the Crown and the courts must protect the **privilege**. Even the right to full disclosure, which is part of the constitutional right to make full answer and defence, will not override the **privilege** …
>
> **…**
>
> The **privilege** is not simply in place to advance the public's interest in combating crime. One of its purposes is to protect the **informer** from retribution. While that purpose itself has a policy dimension, nevertheless the **informer** has a private interest in being protected from retribution which is furthered by the **privilege**. *If the **privilege** is **breached** and the **informer** suffers harm, the **informer** has a private interest in recompense.* [60]

In *John Doe v. John Doe*, [61] the plaintiff sued the police and others. He claimed that during a Crown attorney's examination-in-chief, a police witness had revealed his identity as a police **informer**. He alleged that the Crown should have objected to questions and answers that led to his being revealed as an **informer**. In granting the **informer's** request for a sealing order of the file and a publication ban in relation to the civil action, the judge stated:

> … Civil liability for **breaches** of **informer privilege** supports the values which led to the creation of the rule, and operates in tandem to support the protection of the identity of **informers** in the criminal justice system. Accountability in the civil system is part of the safety-net which is meant to protect **informers** from retribution and encourage cooperation by potential **informers**. Reducing

> or eliminating civil redress for damages associated with **breaches** of **informer privilege** by failing to protect the **informant's** identity is contrary to the public interest …
>
> … Commencing a lawsuit for damages relating to **breach** of **informer privilege** does not mean that the **privilege** is waived for all purposes. To hold otherwise would undermine the rationale and eliminate part of the safety-net which is meant to protect **informers** and encourage cooperation by potential **informers**. Reducing or eliminating civil redress for damages associated with **breaches** of **informer privilege** by failing to protect the **informer's** identity is contrary to the public interest. [62]

The Divisional Court upheld the decision of the motions judge. The appellate court said:

> **Informant privilege**, to be effective, must bar disclosure of **privileged** information in court. Indeed, the courtroom is a place where the risk of such disclosure is particularly material. The **consequences** of **breach** of **informant privilege** could be extremely serious. Where the **privilege** is **breached**, and serious **consequences** do result, it would seem reasonable that there should be some remedy in law.
>
> The motion judge concluded that this case presents questions in an area where the law is not settled. In her view, it is not plain and obvious that a claim for **breach** of **informant privilege** is not an exception to absolute **privilege** attaching to utterances in court. We agree with this conclusion. [63]

The prospect of civil action and damages for **breach** of protecting **informers** provides another incentive for carrying out the obligation to protect properly.

The duty to protect **informants** means that information should not be shared for non-criminal purposes and that efforts should be made to ensure that the number of people with access to confidential information should be restricted.

In *New Westminster Police Department (Re)*, [64] the court held that **informant** information could not be used in police disciplinary proceedings. In rejecting the notion that **informant** information could be used for non-criminal purposes, the judge stated:

> *[T]here is a bright line separating investigations under the Police Act pursuing administrative objectives, and the enforcement of criminal or quasi-criminal law.* In other words, not only does the applicable legislation not purport to permit those performing investigative functions under the Police Act access to **informant** information, it enforces the common-law proscription against it. [65]

The Court of Appeal upheld the determination in *New Westminster.* After reviewing several Supreme Court decisions emphasizing the importance of **informer privilege**, the Court said: [66]

> 81 We are, of course, bound by the rulings of the Supreme Court of Canada. It is thus not open to us, in my opinion, to "create" a new exception to the rule or to circumvent it by 'expanding' the circle of **privilege** for the PCC or for PSS investigators under the *Police Act.* If we were to extend the circle of **privilege** beyond those police officers who are directly involved in enforcing the criminal law to include officers carrying out "administrative" or "disciplinary" duties under the *Police Act*, we would in my view contravene the letter and spirit of the Supreme Court's admonition that the protection of confidential **informants** is an overarching objective to be protected by a "bright line". The comments of the Court in *RCMP* are also apposite:

The judge in *R. v. A.B.* [67] similarly criticised the police for sharing details of the accused's **informant** status too widely. In staying charges against the accused**informer**, the judge said:

> *In support of AB's abuse of process application, Ms. Shemesh stresses that AB's identity as a confidential* ***informant*** *was revealed to everyone who was involved in the investigation of the importation of illicit drugs. It is argued that AB was arrested and charged by the same officers who had been entrusted to work with him/her as a confidential* ***informant***, and argued that AB, subsequent to his/her arrest, was subjected to a video interview during the course of which he/she was restrained from explaining his/her role as a confidential **informant**.
>
> ...
>
> *A confidential* ***informer*** *must have the absolute certainty that his/her status as a confidential* ***informant*** *will never be disclosed to anyone* (save and except for the innocence at stake exception). Without that confidence the **informer** will be subject to possible retribution. *The disclosure of his/her status in this case during the course of the briefings was not only a violation of the common law* ***informer privilege****, but also a violation of the ABCPF policy which states the CHS controlling officer (i.e. handler) shall "Protect the identity of a CHS except when the administration of justice requires otherwise".*
>
> ...
>
> *In my view, where the ABCPF* ***breached*** *the* ***informer privilege*** *by disclosing his/her status at the briefing prior to his/her arrest; where the ABCPF* ***breached*** *the trust inherent in the relationship between* ***informer*** *and handler by having his/her handlers directly involved in his/her arrest; and where the ABCPF released AB in a situation of danger, these are fundamental considerations in whether to allow the prosecution of AB to continue.* In my view, to do so would be to only further prejudice AB. [68]

Because editing the information in support of a warrant to protect an **informant** may lead to an insufficiency of grounds, courts must wrestle with the implications of the editing. In *R. v. DeWolfe*, [69] editing of the Information to Obtain (ITO) left the redacted information insufficient to sustain the issuance of the warrant. However, the court still admitted the evidence. The court set out the following reasons that justified the admissibility of the evidence:

> As stated in *R. v. Liepert*, [1997] 1 S.C.R. 281 at para. 38, and reiterated *in R. v. Blake* [2010] O.J. No. 48 (Ont. C.A.) *the Crown is entitled to limit its defence both of the reasonableness of the warrant and the subsequent search to particular grounds. That is so because of the legal obligation the police and the Crown have to protect the identity of confidential* ***informants*** *as set out* in *R. v. Liepert*, and *R. v. Blake. Therefore the task before this Court is to determine whether there was the requisite basis for the search as disclosed by the redacted ITO. (See R. v. Blake* at para. 16)
>
> ...
>
> The decision in *R. v. Grant (supra)* identified three lines of inquiry that are relevant to the identification and balancing of the interests at play when s. 24(2) is involved. These are the seriousness of the Charter-infringing state conduct, the impact of the Charter violation on the Charter protected interests of the accused and society's interest in the adjudication of the case on its merits.
>
> Relevant to the first line of inquiry being the seriousness of the Charter-infringing state conduct, *I find that the police acted in "good faith" by acquiring a legal authorization for the search. They were required to make full disclosure to the Presiding Justice of Peace. There is no evidence or suggestion that they did not do so. The police and the Crown were legally obligated to protect the identity of the confidential* ***informant***. They did that by removing all material from the ITO that could identify the **informant** before providing the ITO to the Defence.
>
> *Having acted in good faith and as required by the law there is no basis to find that there was any State misconduct.* The absence of any misconduct by police or the Crown favours admissibility. As found in *R. v. Blake*, I also

> find *that the absence of any challenge by the Accused through the options open to him that would potentially have allowed further assessment of police conduct, makes it entirely inappropriate to presume that the police did anything other than conduct themselves as required by applicable legal rules.*
>
> ...
>
> As suggested in *R. v. Blake, if there was a taint of impropriety, or even inattention to constitutional standards to be found in the police conduct, that might be enough to tip the scales in favour of exclusion given the very deleterious effect on the Accused's legitimate privacy interest.* None is apparent from the evidence before me. The evidence seized in the course of the search is therefore admissible pursuant to s. 24(2) of the Charter. [70]

In dealing with **informants** and their information, **informants** must be distinguished from police agents. **Informers** are not clothed with **informer privilege** when they are acting "in the field" on behalf of the police. Thus, if the police ask an **informant** to go into the field and act as a police agent, the **informer** loses "**privilege**" protection. By acting as a police agent, the **informant** becomes a witness to events; a witness must be disclosed to the defence pursuant to the Crown's disclosure obligations.

Sometimes, it is difficult to draw a clear line between **informers** and police agents. However, where a person has been present with the police acting in an undercover capacity, and/or has been a witness to relevant events which form the subject-matter of a charge or evidence of a charge, the person is likely to be seen as an agent rather than an **informant**. In such a case, **informant privilege** will not apply.

In *R. v. Y. (N.)*, [71] the Court of Appeal drew the following line between **informers** and agents. The court said:

> A confidential **informant** is a voluntary source of information to police or security authorities and is often paid for that information, but does not act at the direction of the state to go to certain places or to do certain things. A state agent does act at the direction of the police or security authorities and, too, is often paid. The state agent knows that if charges are laid, his or her identity may be disclosed to the defence and that he or she may be required to testify. *A major distinction is that a confidential **informant** is entitled to confidentiality (subject to innocence at stake considerations) and may not be compelled to testify - protections that are vital to the individuals who provide such information, as they often put their lives on the line to provide information that may be vital to state security. A state agent is not afforded such a shield.* [72]

In *R. v. Lising*, [73] the Court distinguished agents and **informers**. The court summarized the distinctions as follows:

> An **informant** is someone who provides the police with information: *R. v. Babes* (2000), 146 C.C.C. (3d) 465, 161 O.A.C. 386 at para. 10. The **informant** has been referred to as a "tipster": *R. v. Khela* (1991), 68 C.C.C. (3d) 81 at 93 (Que. C.A.). The **informant** is guaranteed confidentiality in exchange for providing the police with useful information: *R. v. Basi*, 2009 SCC 52 at para. 36.
>
> An agent, on the other hand, is not protected by **informer privilege**: *Khela* at 87; *R. v. Scott*, [1990] 3 S.C.R. 979. The agent is asked by the police to play an active role in the investigation. By entering the field and actively participating in the investigation, the agent has waived any **privilege** held as an **informant**: *Babes* at paras. 30, 45; *R. v. Davies* (1982), 1 C.C.C. (3d) 299, 31 C.R. (3d) 88 at para. 1.
>
> ...
>
> The decision of whether a person is an **informant** or an agent is a question of law to be determined by the court, not by the police or the Crown: *Davies* at para. 11. If the person is an **informant**, then the court has no discretion to go behind the **informer privilege** unless the accused's innocence is at stake: *Basi* at para. 39, *Khela* at 87.
>
> Thus, the major distinctions between an **informant** and an agent are:

(i) The **informant** provides information only, whereas the agent goes into the field and participates in the investigation at the direction of the police.

(ii) The identity of the **informant** is protected by a **privilege** which is almost absolute. It is subject only to the innocence at stake exception. The agent has no such protection and his or her identity must be revealed to the defence.

(iii) The **informant** will not testify in any proceedings. The agent will often testify.

(iv) An **informant** may become an agent for the purpose of some investigations, but maintain **informant privilege** with respect to other investigations: Babes at para. 29. [74]

Bruce Webb was a retired police officer who worked as a private investigator for the defence team of an accused charged with murder. He helped the police with taking a statement from a witness. Could he expect **informer** status? The trial judge said that it was unreasonable to expect **informer** status, once active in the taking of statements from a witness. He held:

> While the identity of confidential **informers** must be closely guarded, if Webb ever was a source or a confidential **informant** in these circumstances, *once he met with the police and Blades together to introduce them and to assist in making Blades comfortable such that he would provide a statement to the police, he lost any possible status as a confidential **informant**. While Webb was doing what he thought was "the right thing" and did not participate in criminal activity or act as an agent provocateur, he certainly "stepped into the field" when he met with the police and Blades together.* Webb created a situation of trust between himself and Blades. He then convinced Blades to provide a statement to the police. He then set up a meeting between himself, Blades and the police to facilitate the provision of a statement by Blades to the police.

There could be no expectation of privacy by Webb in these circumstances. He was directly involved in assisting the police obtain a statement from Blades. In addition to that, could Webb really have expected Blades would be bound to keep this meeting with himself and the police a secret? *By meeting with the police and Blades together in these circumstances, Webb abandoned any possible status as a confidential **informant** and jumped directly into the role of being an active participant in the police investigation.* Webb was not merely a citizen who quietly provided the police with information about criminal activity with the expectation of confidentiality. Instead he became an active participant in the criminal investigation and as such is not a source or a confidential **informant**. [75]

R. v. Y. (N.), [76] the defence disputed the trial judge's finding that a Crown witness was not a state agent. The defence emphasized that the trial judge had misunderstood the significance of the lack of a letter of agreement between the alleged agent and the police. In dismissing the defence argument, the Court of Appeal explained:

> *The appellant placed some emphasis on the trial judge's use of the lack of a signed Letter of Agreement in concluding that Shaikh was not a state agent*, arguing that he misconstrued the indicia of agency in this respect or that he improperly elevated form over substance in his analysis. I do not agree.
>
> It is apparent from the foregoing findings that *the lack of a formal Letter of Agreement between Shaikh and the RCMP* at the time of the Washago Camp *was only one of a number of factors the trial judge assessed in making his finding that Shaikh was not a state agent. The transformation from confidential **informant** - Shaikh's status when he came to the RCMP from CSIS - to state agent is a subtle one, as the trial judge noted. A Letter of Agreement is one of the final steps and its absence in this case was telling.*
>
> *A Letter of Agreement is not a mere formality. Before it can be executed, the police must interview the individual and prepare a risk assessment to determine the nature of the support that will be provided (including, in this case, whether it would extend to the relocation of Shaikh and his family).* As the trial judge observed, Shaikh could

> make no informed and effective waiver of his rights to confidentiality until he had this information. *The Letter of Agreement would make it clear that Shaikh was voluntarily waiving any confidentiality* ***privileges*** *that he had, and would specify the expectations and obligations of the RCMP.* The fact that Shaikh had not executed such a document before the Washago Camp was a legitimate consideration for the trial judge to weigh in determining whether Shaikh had or had not become an agent of the state at that time.
>
> *Whether Shaikh was or was not a state agent was an important issue for the defence because if he were, that fact would lend more force to the appellant's arguments on entrapment and abuse of process. I would not interfere with the trial judge's finding that Shaikh was not a state agent.* [77]

Brind'Amour v. R. [78] cited *R. v. Y(N)*, above, as properly delineating the line between police agent and police **informant**. In *Brind'Amour*, the line was important, for the police allowed an agent to commit offences while under their control. As a **consequence**, the court upheld the trial judgments staying the prosecutions for abuse of process. In commenting on the line between **informants** and agents in the context of the cases under review, the Court of Appeal noted:

> The distinction is important. As Morin J. pointed out, according to the RCMP documentation, the officer who acts as the handler or controller of the civilian undercover agent must ensure that the latter does not commit any indictable offences or meet with the persons targeted in the investigation outside of the context of the operation. *In short, if Tremblay was an* ***informant*** *working in a criminal environment, it is understandable that the RCMP did not want to disclose his criminal activities because they wanted to avoid putting his life in danger or bringing his collaboration to an end, and especially since he benefited from* ***informant privilege****. If he was a civilian undercover agent, however, he was mandated by the RCMP and was under its control; he therefore had to limit his participation to what was required by the investigation, which was generally dictated by scenarios established by the police officers.* The **consequences** are clear: *it was not open to the RCMP to knowingly allow a civilian undercover agent to commit crimes such as drug trafficking for his own ends, outside of the police investigation, as it did in this case.*
>
> ...
>
> Stated simply, the trial judgments stated the following with regard to the RCMP's misconduct: *there was abuse of process because the RCMP, with the objective of having Tremblay become a civilian undercover agent, allowed Tremblay, who was on parole, to commit indictable offences while it was exercising control over him and should have stopped or reported him, deliberately deceiving the NPB throughout.* It seems clear to me that, if the NPB had not been deceived, the stays of proceedings would not have been ordered. [79]

In drafting affidavits, affiants must be aware of the **informer**-agent dichotomy. If police agents are used in the investigation process and it is their information which is relied on to obtain a search order, there is no need to protect the agent's identity. In contrast, the police must protect true **informants**. If the identity of an **informant** becomes known, there may be serious reprisals against the **informer** or his or her family. **Informants** have been murdered for providing information to the police. Sections 187 and 487(3) of the *Code* attempt to maintain the secrecy of **informant**-related material.

Despite statutory and common law protections of **informants**' identities, some police officers remain averse to providing actual names, if known, of **informers** in the materials supporting wiretap orders. There is no requirement that the police provide full details concerning **informer** identities. However, there are times when failing to provide details can lead to difficulties. For one thing, sometimes an **informant** must be named as a target in the authorization, *e.g.*, where the **informant** is a family member or close associate of another named target. [80] If the **informant** in such a case is merely identified by a code, the issuing justice may not know that one of the named targets is the **informant**. This non-disclosure could lead to a successful attack on the validity of the authorization. There are also rare occasions where an **informant** may later become an accused in the investigation for which he or she provided information. Indeed, this may be how it becomes known that the **informer** was also a target of the investigation.

Providing full **informant** details to the issuing judge in an appendix means that the reviewing judge may have access to them during the *Garofoli* review. The reviewing judge may then usefully compare what has been given to the defence as part of the redacted materials with what was presented to the issuing judge. *R. v. McGee* [81] illustrates the utility of this approach, for in this case the *Garofoli* judge compared the known materials with the edited materials and was able to conclude:

> The information contained in the unedited Appendix 1 is almost entirely, and very clearly in my view, covered by **informer privilege**. It contains details which might directly or directly, explicitly or implicitly, reveal the identity of the confidential **informants**. Despite the heavy redacting, in my view the Crown has fairly edited the materials.
>
> ...
>
> Having determined that the contents of Appendix 1 are properly the subject of **informer privilege**, production can not be compelled as part of the *Stinchcombe* disclosure to be provided by the Crown.
>
> The redacted Appendix 1, together with the summary of the contents of Appendix 1, are, in my view, sufficient and proper disclosure in the circumstances of this case. [82]

In *R. c. Lacas.*, [83] the appellant argued that because the appendices containing information concerning confidential **informants** were unsworn, the affidavit could not be relied upon by the reviewing judge. The Quebec Court of Appeal dismissed this argument holding that, as the appendices were part of the sworn affidavit, the affidavit was proper. The court stated:

> *The appellant also presented a motion to exclude wiretap evidence in which he alleged that the appendices had not been signed nor given under oath.* **Consequently**, he argued, the judge could not consider them.
>
> ...
>
> To conclude, the affidavit presented in this case was sufficient to establish the reliability of the information submitted. *In regard to the fact that the appendices were not signed, the trial judge correctly relied on a judgment of the Ontario Superior Court of Justice according to which* "[t]he *appendices to the affidavit are an integral part of it*". The trial judge committed no error in ruling as follows: [translation]
>
> "[9] While in some cases it may be desirable that the appendices to an affidavit be signed and sworn, *the Court finds that in the present case, the appendices are an integral part of the affidavit signed by Officer Fillion and the information contained therein could be considered in the same manner as the other allegations in the affidavit.*" [84]

Because the reliability of **informants** may be the key to the issuance of an authorization, it is crucial that the issuing justice have as much detail about the **informant** as possible so that he or she is able to form an independent conclusion about the **informer's** reliability. Where **informants** are anonymous, the issuing justice may simply have to gauge reliability by the compelling nature of the information provided and/or whether that information is corroborated. Where the **informant** is known, on the other hand, many details going to the reliability of the **informant** may be available. In some cases, the police will have used the same **informers** on previous occasions and may have a track record of their reliability or unreliability. Factors going to the credibility of **informants** include:

(a) whether they have been paid by the police;

(b) the existence of outstanding charges;

(c) reasons the **informant** may be looking to curry favour with the police; drug or alcohol addictions;

(d) mental health problems;

(e) involvement in the very scheme or acts which the police are investigating;

(f) personal reasons to dislike the target of the tip.

Many of these details about **informants** may be crucial to the issuing justice deciding whether the **informant** and his or her information are reliable. It is recommended that as much relevant **informant** information (albeit information that will be redacted later) be included in the supporting materials.

On a *Garofoli* application, the sufficiency of information supporting the reliability of the confidential **informant**, in the materials justifying the issuance of the impugned wiretap authorization, is a common area of attack. *R. v. Milani* [85] is illustrative of attacks made on confidential information in a supporting affidavit. In *R. v. Milani*, [86] the defence argued that, in the affidavit, there were insufficient reasonable grounds to believe an offence was committed to justify the issuance of the warrant. The confidential **informant** component making up the reasonable grounds in the material was a prime focus of the attack. The trial judge summarized the nature of the attack as follows:

> In this case the defence takes the position that *there was no objective factual basis for the authorizing justice to decide that CHS #1 was credible and reliable.* The defence position is that *there is no specific evidence about whether the **informant** was paid, expected consideration or had outstanding charges, or if the **informant** had proved reliable in the past.*
>
> > Furthermore, the defence submits that *the tip itself is neither detailed nor compelling. It is a bald assertion by the **informant*** that Tony is part of an importation/distribution scheme and is supplying Alex with cocaine. *It does not set out the source of the information or contain sufficient detail to ensure it is based on more than mere rumour or gossip or speculation.* Details related to the phone, car, residence and occupation of Tony are not details of criminal activity.
>
> Finally, the *defence submits that corroboration did not confirm either i) the credibility of the **informant** or ii) the criminal aspects of the tip.*
>
> ...
>
> *There is no information or investigation outlined in the affidavit that indicates any criminal aspect to any of the contacts between the individuals. In addition the defence points to some discrepancies and the lack of evidence to support an inference that the tips was unreliable*: e.g. whether the nature of the calls on the buy date was unusual between the parties; whether there were other calls placed by Alex on the day of the first buy, or who lived at the address on the date of the buy. [87]

In rejecting the defence attack, the trial judge noted that the test for sufficiency of **informant** information must be assessed in light of the totality of circumstances. [88] The trial judge stressed:

> The court must look to a number of factors including:
>
> a. the degree of detail of the tip;
>
> b. the **informer's** source of knowledge;
>
> c. indicia of the **informer's** reliability such as past performance or confirmation by other investigative source,

> The court should review whether the tip contains sufficient detail to ensure it is based on more than mere rumour or gossip, whether the source discloses his or her source or means of knowledge and whether there are any indicia of his or her reliability.
>
> In assessing the reliability of a tip from a confidential source, three factors are relevant: (1) whether the confidential source is credible; (2) whether the information provided about a criminal offence is compelling; and (3) whether the information is corroborated by police investigation. The totality of the circumstances must meet the test of reasonableness. A weakness in one area may to some extent be compensated by strengths in the other two areas …[89]

In assessing the adequacy of the confidential **informant** information in the material supporting the issuance of an authorization on the basis of the 'totality of circumstances', the trial judge in *R. v. Milani*[90] correctly highlighted the three Cs identified by the Supreme Court in *Debot.*[91] Was the **informant** information *credible, compelling* and/or *corroborated*? The trial judge accepted that there were inadequacies in respect of the information surrounding the confidential **informant**. She recognized, however, that insufficiencies could be the result of information being properly redacted or kept out of the warrant material because it could identify the **informant** pursuant to an **informant's privilege** against identification. She stated:

> There is no disclosed evidence of the source or means of knowledge of the **informer**. I make no adverse inference based upon the failure to disclose the source of the information. *It seems to me that the source of the information will often be redacted in disclosure to avoid information that might tend to identify the **informant**, particularly where security concerns have been cited by the **informant**.* Nonetheless, the **consequence** of the failure to provide such information is that the source or basis of the information is not available to be used to assess the reliability of the tip.[92]

The trial judge in *Milani* was content that, on the totality of the circumstances, the tip of the confidential **informant** was sufficiently credible, compelling and corroborated, despite the lack of information about its source, to make out the grounds required for the issuance of the authorization.[93]

In addition to assessing the **informant's** information in reference to the three Cs — compelling, credible or corroboration — some courts have suggested additional measures. *R. v. Yong*,[94] for instance, applied other yardsticks for measuring confidential information. The court stated:

> It is well established that where the police rely upon information from a CI to meet the standard of "reasonable suspicion", the Court must consider the extent to which the information from the CI is compelling, credible, or corroborated by other parts of the investigation. Each factor does not form a separate test. Weaknesses in one area may be compensated by strengths in the other two: *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1143.
>
> In *Gilmour*, at para 21, Renke J elaborated on these 3 factors by specifying 5 aspects of information from a CI that are important — *(a) the age of the information, (b) the content of the information (respecting both alleged offences and other matters), (c) the sources of the information, (d) the reliability and credibility of the **informant**, and (e) corroboration.*[95]

In *R. v. Black*,[96] the defence attacked the unreliability of the **informant** information contained in the wiretap materials because the affiant had not been the handler of the **informants**. The court rejected the notion that affiants had to have direct contact with **informants** to rely upon their information. In other words, hearsay information could be relied upon. The real issue is whether the issuing and reviewing judge has the capacity to independently assess the reliability of the **informant**. In any event, the court stressed that there was still sufficient reliability, as the sources had been corroborated. The Court of Appeal held:

Mr. Black submits the information relied upon by the affiant is not reliable because he [the affiant] was not the handler of the sources. This, in his view, detracted from the information received by those sources. *This proposition has been explicitly rejected by this Court.* In *R. v. Drapeau (J.)* (2001), 239 N.B.R. (2d) 103, [2001] N.B.J. No. 230 (QL), 2001 NBCA 68, Drapeau J.A. (as he then was) wrote:

> "The affidavit that the appellant is challenging here is based in part on information obtained by the affiant from the handlers of a handful of police **informants**. *As was the case in Araujo, no affidavit from these persons was provided to the issuing judge and the affiant who provided the affidavit in support of the application for authorization had no direct contact with these sources* of information. *The affiant states that he concluded that each* ***informant*** *was reliable on the assurance of the* ***informant's*** *handler that this source of information was trustworthy.* I am of the opinion that the issuing judge could rely on this conclusion to give probative value to the information provided by these **informants**."

> "*On this point, I reject the appellant's argument that this information had no evidentiary weight unless the affiant had undertaken further investigations to make sure that the* ***informants*** *were reliable.*"

...

There must, however, be sufficient evidence to enable the judge to test the reliability of the information in order to be satisfied that the requisite grounds exist: R. v. Dickson (J.R.) (1996), 178 N.B.R. (2d) 98 (Q.B.), [1996] N.B.J. No. 218 (QL), at para. 49. *In the present case, the affiant corroborated much of the information received from each source, either by evidence obtained through other investigative measures or by information received from other sources.* Further, his affidavit contains the following information regarding each source:

a. Whether they were paid or not for information provided;

b. How long the handler knew the source;

c. How long the source had been providing information to the handler concerning criminal activities;

d. Criminal record of the sources regarding perjury;

e. If information provided by the sources in the past have lead to searches, seizures or charges under the *Criminal Code* or the CDSA; and

f. How information provided by a source was received by the source. [97]

In *R. v. Loewen*, [98] the court allowed a Crown appeal of the quashing of a search warrant. The trial judge had criticized the affiant for failing to specify details of the amounts paid to **informants**. The Court emphasized that it is the payment rather than the amount that is important. In any event, it is the totality of circumstances concerning the **informants** that matters. The Court held:

> The judge noted that the monetary consideration paid to both **informants** was disclosed but not the amount. I interject to observe that *in the majority of cases it is the fact of the payment—and not the amount—that is of any real relevance.*
>
> > The Crown argues that in all of these criticisms of the **informants'** contribution to the investigation the judge fails to look at the "totality of the circumstances" as directed by *Garofoli.* I agree.

> *In assessing the totality of the circumstances one must look to (a) the extent to which the information predicting the criminal offence is compelling, i.e. the extent of detail provided; (b) the credibility or reliability of the source; and (c) the extent of corroboration.* [99]

In *R. v. Lucas*, [100] the defence attacked the lack of a track record as undermining an **informant's** reliability. The trial judge stressed that the totality of circumstances compensates for the lack of a previous history of an **informant**. The judge stated:

> *I do not see that the lack of a track record for these **informants** materially undermines the information that they provided.* I reach that conclusion for two main reasons. First, for the purposes for which the information was provided, *the lack of a track record is not significant. Much of the information provided by **informant** #1 was capable of being corroborated by the police.* The fact of the shootings, where they occurred, when they occurred, some of the persons involved, the existence of the gangs and their rivalries and so on, were largely matters that the police already knew. In that regard, I reject the suggestion of the applicant that **informant** #1 could have collected all of the information that s/he provided from media reports of these events. For one thing, there is no evidence before me as to how much publicity there was regarding these events and in what detail. For another, that explanation while theoretically possible is not one that sensibly arises given the number of events and the degree of detail known. In terms of **informant** #2, the information that s/he gave regarding the possession of a gun by a specific person, and the details of that gun, were subsequently confirmed when the individual involved turned the gun over to the police. While there again may have been some small details that did not match up, the overall thrust of the information from **informant** #2 could be corroborated.
>
> *The applicant's attack on the value of the information provided by the confidential **informants** is based largely on the fact that the **informants** had no track records and, at least with respect to **informant** #1, the sources for the information were not revealed.* These criticisms mirror those made in *R. v. Riley*, [2009] O.J. No. 738 (S.C.J.). I agree with the response made to them by Dambrot J. at para. 121 where he said:
>
> > "*These frailties undoubtedly affect the weight that can be placed on the individual pieces of information. But none of these frailties necessarily result in the information having no value.*"
>
> Even though the **informants** were in fact untested sources (and the Crown accepts that they should be so treated), *their information still had a measure of reliability to it because of the degree of corroboration that the police could find for it.* In that regard, it should be remembered that corroboration is not required for each and every detail in order for information from a source to be found to be reliable. *An overall testing of the reliability of the information provided is sufficient.* [101]

In *R. v. Windebank*, [102] the *Garofoli* judge, reviewing the sufficiency of a search warrant, emphasized that the credibility of **informers** is always a factor in assessing the validity of a warrant. In dismissing the defence attack, he said:

> The motivations of confidential **informers** are always a relevant consideration when assessing their reliability and credibility. Confidential **informers** can be motivated by any number of things; some for money, some to settle a score, some to glean favour with the police, and indeed some to perform their civic duty (that last club might not be a crowded one). On the facts here, I am satisfied that the issuing justice had enough information to assess the credibility and reliability of the confidential **informants**. The ITO makes clear which of the group were paid. In my view, the amounts they were paid is irrelevant as what anyone will do for money is so subjective as to render objective review impossible. In any event, however, even assuming the motivations of the confidential **informants** to be *mala fide*, the issuing justice had enough information to assess their credibility and reliability. The information about their criminal records (if any), the cross-corroboration, the covert entry results, and the surveillance evidence all add up to render assessment of motivation arguably superfluous. Again, it is not my task

> to assess whether the issuing justice should have decided the confidential **informants** to be credible but whether she could have. There was a basis in the evidence for such a determination. [103]

In *R. v. Jones*, [103.50] the Court of Appeal for Ontario applied the "well-settled legal principles" set out in *R. v. Debot* [103.60] for assessing the sufficiency of grounds where the affiant relies on information from a confidential **informer**. In holding that it was open to both the issuing justice and reviewing justice to conclude that the **informer** was credible, the Court observed that "while [a financial motivation to assist the police] is a factor to consider, financial compensation is quite often provided to **informants** and should not, in and of itself, render a source uncredible". [103.70]

R. v. Parsley [104] allowed a Crown appeal of a trial judge's quashing a warrant. The court criticized the trial judge's handling of the **informant** information. Because the **informant's** information has not led to previous arrests is not determinative of the **informer's** reliability. Minor discrepancies in the information provided by different **informants** are also not necessarily crucial. The court stated:

> … While a "successful" arrest or prosecution can be evidence of reliability, *it does not follow that because there was no "successful arrest or prosecution" the information is unreliable.* Many factors go into a police decision to seek a search warrant or to arrest someone, and because they do not choose to do so every time they are provided with information does not mean the information is not reliable (See *Whalen*, paragraph 38)…

> The Judge's focus on finding differences in the ways that Sources A and B described information is not the task of a reviewing Judge. *Minor differences in descriptions are to be expected when information comes from different people.* In fact, such minor differences may enhance the credibility of the information. Two people seldom use the same words to describe the same event. *By focusing on minor differences in descriptions and the inclusion of extraneous information, the Judge failed to take a holistic approach to the totality of the circumstances.* His microscopic approach diverted him from considering the considerable remaining and detailed information in the totality of the circumstances. Moreover, and very significantly, *two confidential **informants** provided similar information to their handlers independently of each other and within a day of each other. The Judge failed to consider this fact in his analysis, and his failure to do so was an error.* [105]

In *R. v. MacDonald*, [106] during the review of a *Garofoli* attack on a search warrant, the sufficiency of the ITO was attacked. An anonymous tipster had been relied upon in the ITO materials. In dismissing the attack, the Court of Appeal for Ontario made the following comments:

> Where the application for the warrant is based largely on information coming from a confidential **informant**, the court must make three inquires:
>
> * Was the information predicting the crime compelling?
> * Was the source of the information credible?
> * Was the information corroborated by the police before conducting the search?
>
> These are not watertight inquiries. *It is the "totality of the circumstances" that must meet the reasonable probability standard.* See *Debot, supra.*
>
> So, for example, *where, as in this case, the police rely on information coming from an anonymous source, the second inquiry is problematic. The court has no way to assess the credibility or reliability of the source. Thus, the quality of the information (the first inquiry) and the amount of corroboration (the third inquiry) must compensate*

> *for the inability to assess the credibility of the source.* A higher level of verification is required. See *R. v. Hosie*, [1996] O.J. No. 2175 (C.A.) at para. 15. [107]

R. v. MacDonald stressed that the ability to rely on tips from anonymous tipsters whose credibility is unknown must rest on the compelling nature of the tip and the extent that the tip is corroborated. The criminal record of the target, especially if it contains convictions for the same offences under investigation, may enhance the cogency of the record's utility as part of the totality of circumstances under consideration. The court stated:

> *Because the credibility of the source cannot be determined, the totality of circumstances assessment must focus on whether the tipster's information was sufficiently compelling and whether it was sufficiently corroborated.*
>
> ...
>
> > At the same time, *the police were not obliged, before conducting the search, to confirm the very criminality alleged by the tipster.* See *R. v. Lewis*, [1998] O.J. No. 376 (C.A.) at para. 22; and *R. v. Caissey*, [2007] A.J. No. 1342 (C.A.); aff'd [2008] 3 S.C.R. 451.
>
> It seems to me that the police largely confirmed the tipster's information. *The police record and data banks confirmed the accuracy of the detailed biographical information given by the tipster.* I accept that *on its own, this degree of confirmation likely would not be sufficient to justify the authorization.*
>
> > However, the police investigation also confirmed that the appellant had in the past possessed both drugs and guns, and was a known violent offender, who was bound by two separate firearms prohibitions and probation orders prohibiting the possession of guns. Admittedly, *this history was drawn from the appellant's criminal record. The appellant argues that a criminal record may provide some independent confirmation of a tipster's information but should not be given a great deal of weight.* He correctly points to Martin J.A.'s observation in *Debot*, [1986] O.J. No. 994, that although a criminal record deserves some weight, by itself it does not make out reasonable probability.
>
> Accepting that to be so, *the cogency of the criminal record depends on its similarity to the criminal activity alleged by the tipster and the age of the record. Here, the appellant was convicted of possession of a prohibited firearm, the very criminal activity the tipster alleged, and that conviction was registered within two years of the anonymous tip. These considerations give the criminal record a fair measure of cogency.*
>
> Overall, the appellant's record together with the confirmation of the detailed biographical information given by the tipster reasonably support the trial judge conclusion that the authorizing justice could have granted the authorization. *I would not give effect to this ground of appeal.* [108]

The Court of Appeal for Ontario applied *R. v. MacDonald* in *R. v. Jones*. [108.50] Although "more could have been done to further corroborate what the CI told the affiant", that was not, standing alone, a reason to intervene. In that case, the police were able to corroborate "many biographical details" provided by the **informer**, and that the criminal activity described by the **informer** appeared to be taking place — including that someone had recently overdosed in the apartment. The Court affirmed the requisite standard as follows:

> For evidence to be corroborative, at least in this context, it does not need to conclusively prove criminal activity, nor does it need to confirm every detail: *R. v. MacDonald*, 2012 ONCA 244, 290 O.A.C. 21, at para. 20. What matters is that the independent information conforms sufficiently to what one would have anticipated based on the **informant's** information, such that "the possibility of innocent coincidence is removed": *R. v. Dunkley*, 2017 ONCA 600, at paras. 15–16; *Debot*, at p. 1172. [108.60]

Simply because someone has provided information to the police does not mean that **informer privilege** will be afforded. In *R. v. Cook*, [109] the Crown received, from an unidentified person, information that was relevant to an ongoing appeal. Was the person who sent the information an **informant**? The lack of contact by the person with the police undermined any entitlement to **privilege**, for it meant that no promise of confidentiality, implied or explicit, could have been conveyed by the police.

The court distinguished the situation from a Crime Stoppers context when providing information was "founded on a promise of anonymity". In determining that the person was not an **informant** and no **privilege** attached to the information, the court held:

> *In my view, the identity of the author is not protected by either **informer** or public interest **privilege**.* There is therefore no need to determine whether the "innocence at stake" exception is engaged.
>
> I turn first to the issue of **informer privilege**. It was submitted that the law is not clear on this point. *The leading cases analyze **informer privilege** on the basis that some promise of confidentiality express or implied is necessary.* However, in *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, Binnie J. seems to have left open the question when he stated, at para. 32: "[i]t might be argued that in a situation of serious potential danger, the **informer privilege** (or other public interest **privilege**) might apply even in the absence of the contract-type elements of offer and acceptance."
>
> *In my view, this matter was settled in R. v. Named Person B*, 2013 SCC 9, [2013] 1 S.C.R. 405, at para. 18, when Abella J. confirmed that *there must be some conduct on the part of the police from which a promise of confidentiality could be inferred, either expressly or implicitly*:
>
> > *The legal question is whether, objectively, an implicit promise of confidentiality can be inferred from the circumstances.* In other words, would the police conduct have led a person in the shoes of the potential **informer** to believe, on reasonable grounds, that his or her identity would be protected?
>
> *In this case there was no conduct on the part of the police, express or implied, that could have led the author to believe that his or her identity would be protected. The police merely received an unsolicited anonymous email. The test for **informer privilege** is not satisfied on the facts of this case. (This is unlike a "crime stoppers" communication which is founded on a promise of anonymity.)*
>
> *I similarly conclude that public interest **privilege** does not apply.* Public interest **privilege** involves a claim by a government or an official that certain information should be kept secret. Typical situations involve the need to keep police investigative techniques confidential or the protection and safety of individuals. The Crown has the burden of establishing the need to keep the identity of the author secret. The Crown attempted to satisfy this burden by alleging that the author's mental health issues, fear of police and fear of retribution engage public interest **privilege**. However, there is no objective evidence underlying the author's fears. On the record before us, the Crown's burden has not been met.
>
> *The identity of the author of the email is not covered by **privilege**, either as a confidential **informant** or by way of public interest.* [110]

In determining whether **privilege** attaches to tips, context will be everything. In *Enache v. Canada (Citizenship and Immigration)*, [111] an immigration hearing officer received information (via poison pen letters (PPLs)) about the applicant originating from a tip line and an email. Upon review, the judge concluded that both tips were entitled to **informer privilege** status. The judge held: [112]

> In the present case, *the Applicant acknowledges that the first PPL is protected by **informer privilege**, because it was provided to IRCC through its fraud tips email address.* The evidence in the record includes a copy of IRCC's webpage for its tip line, which expressly states that the information provided will remain confidential. However,

> *the Applicant takes the position that the second PPL is not subject to* ***privilege****, because it was provided to IRCC through its public email mailbox.*
>
> *I disagree.* While the substantive contents of both PPLs are redacted in the copy of the GCMS notes in the record in this matter, *the unredacted portions clearly show the* ***informer*** *stating in both PPLs that he or she wishes the communication to remain confidential. Given that the first communication was made through the fraud tips line, where there was an express promise of confidentiality made by the receiving authority, and that the* ***informer*** *clearly had an expectation of confidentiality in relation to both PPLs, I find that the second PPL was made in response to that same promise, and that the test for* ***informer privilege*** *is met.*

An **informer** may waive **privilege** in connection with a specific investigation and prosecution. This is not to say, however, that the **informer** may be asked about non-related cases in which he or she was also an **informer**. In other words, a waiver for one case may not necessarily constitute a waiver of all of an **informer's privilege**. In *R. v. Khan*, [113] for instance, the defence sought further information from an **informer** who had waived **privilege** to testify in a specific prosecution. The judge dismissed the defence request for disclosure of the **informer's** activities in unrelated investigations. He held:

> *The evidence before me shows that the witness disclosed information to the Integrated Gang Task Force on matters unrelated to this alleged offence. The risk to the witness if this information is disclosed is real and potentially significant.* As noted in *Leipert* the courts are ill-suited to determine whether disclosure of information given to the police might be sufficient to reveal the identity of the **informer**: para. 28. *Even if the Source's identity has been revealed, the* ***privilege*** *remains intact regarding the information which may connect him to having provided specific information to the police on other matters.*
>
> **…**
>
> *Had it not been for the Source's participation in this criminal investigation and his agreement to waive his* ***privilege*** *in respect of this investigation and prosecution, I am satisfied that his identity as an* ***informer*** *in relation to unrelated matters would not have been disclosed.*
>
> **…**
>
> *Having concluded that the* ***informer privilege*** *exists, I am bound to give it full effect.* The innocence at stake exception to the **privilege** rule does not apply. There is simply no evidentiary basis to support this exception in the circumstances of this case, as required by *Named Person v. Vancouver Sun*, [2007] S. C.J. No. 43, para. 27. [114]

Sometimes a purported waiver by an **informer** may not be accepted. This happened in *R. v. Named Person A.* [115] The judge explained why she did not accept the **informer's** waiver. She also explained that, in any event, a waiver by an **informer** may still rely upon Crown input. She held:

> … The **informant** must have full knowledge of the nature and extent of the **privilege** being waived, and of the **consequences** of her waiver: …
>
> I conclude that Named Person A has not waived his **informant privilege**. He did not use the word "waiver" in its legal sense. It is clear that he wants to have the assistance of counsel, and may also want support through a process that is bound to be stressful. It is also clear that he wants to maintain confidentiality as against the subject of his information. Though his conduct is not perfectly consistent with a desire to maintain confidentiality, in these circumstances it would be unjust for me to treat past lapses as waiver and use them to void the **privilege**.
>
> Even if Named Person A's waiver were valid, it would not bind me: *Named Person* at para 25, *Barros* at para 35. I could, and would, maintain the confidence despite his wishes.

> If Named Person A did validly wish to waive **privilege**, that would not end the matter because "**informer privilege** belongs jointly to the Crown and to the **informant**. Neither can waive it without the consent of the other": *Basi* at para 40. Named Person A's evidence illustrates why. He may not have thought through all the potential effects of revealing his **informant** status, even to people close to him. The Crown and police can provide a perspective that is broader, more experienced, and more cautious. Further, law enforcement has its own interest in assiduously maintaining the **privilege**. Just as minor pieces of information may suggest the identity of an **informant**, the identity of an **informant** may suggest that the police possess certain information or that certain investigations are underway. Here, the Crown does not waive **privilege**.
>
> As Named Person A's so-called waiver is not effective, and the Crown and police do not consent to any waiver, the **privilege** remains in effect. [116]

While rare, sometimes the defence may seek to call someone who they claim was an **informant** relevant to the proceedings. In *R. v. Golding*, [117] for instance, the defence sought to call the **informant** that they said was the source of information in the challenged search warrant. The trial judge in *Golding* held an *ex parte* hearing, as part of the *Garofoli* hearing challenging the warrant, to ensure that the **informant** had given a fully informed waiver of the **privilege**. He emphasized the need for independent counsel for the **informant**. He stated:

> At the outset of the application, the Crown provided a redacted information to obtain which edited out information which might serve to identify the confidential source. However, the applicant produced an affidavit of a person who self-identified as the person said to have been the confidential source. In a separate *ex parte*, in camera hearing, conducted in accordance with the procedure and principles set out by the Supreme Court of Canada in *Regina v. Basi*, 2009 SCC 52, *the confidential source with the benefit of independent counsel provided a clear, express and informed waiver of her right to **informer privilege** to her identity being publicly known*… [118]

Sometimes, objecting to a question on the basis of **informer privilege** may be counterproductive, for the objection alone may tend to identify the **informer**. *R. v. Noel de Tilly* [119] illustrates the problem posed by being unable to identify the basis of an objection. In this case, the Crown asked for an adjournment during the cross-examination of a police officer in relation to an inquiry into the validity of a search warrant. There was no articulation for the basis for the request. After a substantial delay in the proceedings, the judge asked for reasons for the adjournment. The Crown said that their instructions precluded saying anything other than it was **privileged**. The trial judge explained:

> Mr. Price advised the Court that whatever it was that caused the adjournment was a matter of **privilege**. I was told only that "A question of **privilege** arose" according to my notes. I enquired as to the nature of the **privilege**; in other words, what was the nature of the **privilege** the Crown relied upon. In other words, whether the **privilege** would be solicitor/client **privilege**, or litigation **privilege**, or **informant privilege**, or something else. I was advised that that information could not be revealed.
>
> In the result the matter that arose that required the adjournment is completely unknown to me and of course unknown to defence counsel.
>
> Mr. Price acknowledges that in May of 2014 during a break in cross-examination Constable Westra approached Crown counsel and raised the matter, whatever it was, which it is said required an enquiry by the Crown. So it appears something arose during cross-examination of the officer. Really that is all that is known about it.
>
> Defence counsel points out that it seems that Constable Westra had a conversation with Crown counsel while under cross-examination. No prior leave was granted to allow this.

...

> In response to my question Mr. Price has assured me the matter does not relate to the credibility of Constable Westra. Mr. Price has also said that he is aware of the Crown's obligations under *R. v. Stinchcombe*, and in his view he has complied with his obligations. However neither the defence nor I have any means to test these assertions.
>
> The Crown also argues that in the cases the defence relies on there is some sort of information or evidence by which the subject of disclosure can be identified at least in a generic way. The Crown argues that in this case however there is really nothing which could be disclosed, if I understand the Crown's argument correctly. [120]

In the circumstances, the trial judged concluded that it was insufficient to merely assert **privilege**. The nature of the **privilege** must also be identified. [121] The judge held:

> There are procedures potentially available to protect confidentiality of information, depending upon the nature of the information and the nature of the **privilege** that is asserted. The procedures potentially available include s. 37 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. There may well be other procedures that could if necessary be adapted or may have to be fashioned depending on the circumstances, but without any information whatsoever at this point, there is no need to deal with those issues further.

...

> I accept that the onus is on the Crown to justify non-disclosure. I accept that as a minimum the Crown ought to disclose the nature of the **privilege** that it asserts, and that there ought to be some evidence in support of the Crown's position.
>
> I have a great deal of difficulty with the assertion that there really is nothing that can be disclosed. There must be in some sense information that goes to the issue. Whether it takes the form of an actual document of course is another question altogether, but some information was imparted, and some enquiry was **consequently** required, of such a serious nature that an adjournment was requested and granted. I am compelled to reject the assertion that there is really nothing that could be disclosed, if that is indeed what is being argued.
>
> In the result, I grant the application. I order that the Crown disclose the nature of the **privilege** it relies on to justify non-disclosure, and that the Crown provide some evidence concerning the position that it takes. [122]

Because the Crown continued to resist an explanation of the nature of the **privilege** sought to be protected, the Crown sought a judicial stay of the proceedings. It was granted by the trial judge.

A Summary of the Features of the Editing Process

The salient features of the editing process to protect confidential **informers** can be summarized as follows:

1. Police may begin the protection of their CI process early by assigning numbers rather than using the names of confidential **informers** in their notes or files. Sometimes they use notebooks devoted exclusively to **informers**. It is unnecessary to edit the notes if confidential **informer** information is not present at all in the notebook.

2. Care must be taken in editing, for failure to use the appropriate method may render what the editor thinks has been redacted visible.

3. The use of vague language or brevity in ITOs designed to protect **informers** while well-intentioned is frowned upon. The affiant must be full, fair and frank with the issuing judge. There is no reason to be vague when the affiant can include all confidential **informer** details, including his or her details such as a criminal record, in an appendix that can be a "tear away" from the affidavit if disclosure is subsequently required to be made to the defence.

4. Moreover, a bare bones assertion of an **informer's** reliability renders the warrant vulnerable on review, for the issuing justice must be able to decide for him or her self the strength of the information justifying the issuance of the warrant.

5. Rarely, the affiant may purposely draft ITOs in a misleading fashion to protect **informers**. For instance, he may create fictitious **informants** in the body of the ITO to mislead the reader away from the real **informant**. If the issuing judge is not misled by such techniques because the affiant has revealed the truth in the tear away portion of the affidavit, this technique may survive judicial scrutiny. But this technique should be avoided.

6. Once a warrant is executed, it may be necessary to provide disclosure of the underlying materials supporting the issuance of the warrant. **Consequently**, ITOs for warrants are frequently pre-edited by using appendices that can be easily detached from the materials going to be disclosed. These appendices are sometimes called tear-aways. Tear-aways are useful when drafting ITOs because it allows the drafter to know whether he or she has enough material in the public part of the affidavit to justify the issuance of the warrant without any reliance on the tear-away materials.

7. The writer of warrant materials may utilize letters or numbers in the edited or public portions of the affidavit materials that he or she knows will be disclosed as a further protection of the **informant**. The real names of the **informers** and other details such as their criminal records, if any, that may identify them should be placed in the tear-away portion of the materials.

8. In any event, before disclosure is provided in connection with search materials, the Crown, working with the police, have the responsibility to ensure that confidential **informant** information is edited out of any distributed materials. This may require painstaking effort, especially since 1000s of pages may be involved in the exercise. As the most trivial detail could reveal the identity of an **informer**, the Crown and the police must employ the utmost diligence in the editing process.

9. Judges may review the editing process to ensure that no over-editing has been conducted by the Crown. Sometimes, the review by the judge is conducted in open court with the accused present. The judge may have both the unedited and edited copies to compare what has been edited out.

10. In some instances, the Crown has re-worked the original ITO materials to camouflage the **informant** or his information that has been disclosed to the defence. When this has been done, the reviewing judge has disapproved of the practice. When the ITO has been drafted with eventual disclosure in mind, it is unnecessary to resort to scrambling the information in the original affidavit materials for disclosure purposes.

11. When in the presence of the accused, both the Crown and the judge must be cautious not to give details of the edited-out information to the accused. Accordingly, the judge and Crown may have to talk in guarded communications to discuss the merits of the editing process. To avoid this process, sometimes the Crown and judge engage in *ex parte* discussions, discussions in the absence of the accused, to facilitate understanding between the judge and the Crown why certain editing was necessary. The defence must clearly be aware that these discussions are on-going. It is common for the defence to consent to this process, especially if it is not the trial judge that is involved in the review of the editing process.

12. After listening to counsel's submissions on the correctness of any editing, the judge may order changes.

13. It is trite that the accused's right to disclosure does not trump **informer's privilege**. There is only one exception to **informer privilege**, and it is not the accused's right to disclosure. It is only when factual innocence is at stake.

14. It is common as part of the defence disclosure requests for the defence to seek the **informer's** handler's notes. A body of caselaw has arisen that specifically deals with if and under what circumstances such notes should be accessed. Sections 8.4.1A and 8.4.1B deal with these cases.

Footnotes

1 Application to Proceed In Camera (Re) (2007), 224 C.C.C. (3d) 1, 285 D.L.R. (4th) 193 (S.C.C.).

2 Application to Proceed In Camera (Re) (2007), 224 C.C.C. (3d) 1, 285 D.L.R. (4th) 193 (S.C.C.), at para. 16.

3 Properly speaking, the concern about revealing the identity of an **informant** in connection with wiretap applications only comes into play at the editing stage, after the wiretap packet is opened. Even so, many police officers are wary of revealing too much information about the **informant** at the point of seeking the authorization. Given the secrecy provisions in s. 187 of the *Code*, there should be little concern about including full particulars about **informants** in affidavit materials. The real focus should be when the packet is opened, at which point, all the **informant**-related information should be carefully edited.

4 R. v. Warsame, 2018 CarswellAlta 2263, [2018] A.J. No. 1184, 150 W.C.B. (2d) 226, 2018 ABCA 329 (Alta. C.A.).

5 R. v. Warsame, 2018 CarswellAlta 2263, [2018] A.J. No. 1184, 150 W.C.B. (2d) 226, 2018 ABCA 329 (Alta. C.A.), at para. 9 (emphasis added).

6 R. v. Chui, 2018 CarswellAlta 2564, [2018] A.J. No. 1292, 2018 ABQB 899 (Alta. Q.B.).

7 R. v. Chui, 2018 CarswellAlta 2564, [2018] A.J. No. 1292, 2018 ABQB 899 (Alta. Q.B.), at paras. 29–31 (emphasis added).

8 R. v. Leipert (1997), 112 C.C.C. (3d) 385, [1997] 1 S.C.R. 281.

9 Application to Proceed In Camera (Re) (2007), 224 C.C.C. (3d) 1, 285 D.L.R. (4th) 193 (S.C.C.).

10 Application to Proceed In Camera (Re) (2007), 224 C.C.C. (3d) 1, 285 D.L.R. (4th) 193 (S.C.C.), at paras. 23, 25–28 and 30 (emphasis added).

11 R. v. Basi (2009), 248 C.C.C. (3d) 257, 311 D.L.R. (4th) 577, 85 W.C.B. (2d) 374, 2009 SCC 52 (S.C.C.).

12 Application to Proceed In Camera (Re) (2007), 224 C.C.C. (3d) 1, 285 D.L.R. (4th) 193 (S.C.C.).

13 R. v. Basi (2009), 248 C.C.C. (3d) 257, 311 D.L.R. (4th) 577, 85 W.C.B. (2d) 374, 2009 SCC 52 (S.C.C.), at paras. 36–40.

14 R. v. Brassington, 2018 CarswellBC 1916, 2018 CarswellBC 1917, 148 W.C.B. (2d) 51, 2018 CSC 37, 2018 SCC 37 (S.C.C.).

15 R. v. Brassington, 2018 CarswellBC 1916, 2018 CarswellBC 1917, 148 W.C.B. (2d) 51, 2018 CSC 37, 2018 SCC 37 (S.C.C.), at para. 2.

16 R. v. Brassington, 2018 CarswellBC 1916, 2018 CarswellBC 1917, 148 W.C.B. (2d) 51, 2018 CSC 37, 2018 SCC 37 (S.C.C.), at paras. 34–36.

17 R. v. Brassington, 2018 CarswellBC 1916, 2018 CarswellBC 1917, 148 W.C.B. (2d) 51, 2018 CSC 37, 2018 SCC 37 (S.C.C.)

18 R. v. Brassington, 2018 CarswellBC 1916, 2018 CarswellBC 1917, 148 W.C.B. (2d) 51, 2018 CSC 37, 2018 SCC 37 (S.C.C.), at paras. 41–42.

19 Iser v. Canada (Attorney General) (2017), 4 B.C.L.R. (6th) 75, 2017 CarswellBC 3213, [2017] B.C.J. No. 2316, 285 A.C.W.S. (3d) 504, 2017 BCCA 393 (B.C. C.A.).

20 Iser v. Canada (Attorney General) (2017), 4 B.C.L.R. (6th) 75, 2017 CarswellBC 3213, [2017] B.C.J. No. 2316, 285 A.C.W.S. (3d) 504, 2017 BCCA 393 (B.C. C.A.), at paras. 10 and 27 (emphasis added).

21 Iser v. Canada (Attorney General) (2017), 4 B.C.L.R. (6th) 75, 2017 CarswellBC 3213, [2017] B.C.J. No. 2316, 285 A.C.W.S. (3d) 504, 2017 BCCA 393 (B.C. C.A.), at p. 393.

22 Iser v. Canada (Attorney General) (2017), 4 B.C.L.R. (6th) 75, 2017 CarswellBC 3213, [2017] B.C.J. No. 2316, 285 A.C.W.S. (3d) 504, 2017 BCCA 393 (B.C. C.A.), at p. 393.

23 United States of America v. Odale, 2014 CarswellAlta 31, [2014] A.J. No. 15, 111 W.C.B. (2d) 719, 2014 ABCA 12 (Alta. C.A.).

24 United States of America v. Odale, 2014 CarswellAlta 31, [2014] A.J. No. 15, 111 W.C.B. (2d) 719, 2014 ABCA 12 (Alta. C.A.), at paras. 12–15 (emphasis added).

25 R. v. Waterfield, [1963] 3 All E.R. 659, 48 Cr. App. R. 42, Crim. L.R. 23, [1964] 1 Q.B. 164, [1963] 3 W.L.R. 946 (Eng. C.A.) test as set out in *R. v. Dedman*, [1985] 2 S.C.R. 2, 20 C.C.C. (3d) 97, 46 C.R. (3d) 193, 20 D.L.R. (4th) 321, 11 O.A.C. 241, 34 M.V.R. 1, 60 N.R. 34, 1985 CarswellOnt 103, 1985 CarswellOnt 942, [1985] S.C.J. No. 45 (S.C.C.) and R. v. MacDonald (2014), 303 C.C.C. (3d) 113, 366 D.L.R. (4th) 381, 453 N.R. 1, 2014 CarswellNS 16, 2014 CarswellNS 17, [2014] S.C.J. No. 3, 111 W.C.B. (2d) 47, 2014 CSC 3, 2014 SCC 3 (S.C.C.).

26 United States of America v. Odale, 2014 CarswellAlta 31, [2014] A.J. No. 15, 111 W.C.B. (2d) 719, 2014 ABCA 12 (Alta. C.A.), *at paras. 20 and 21 (emphasis added)*.

27 Nissen v. Durham Regional Police Services Board, 2017 CarswellOnt 114, 2017 ONCA 10 (Ont. C.A.).

28 Nissen v. Durham Regional Police Services Board, 2017 CarswellOnt 114, 2017 ONCA 10 (Ont. C.A.), at paras. 33 and 35.

29 R. v. McEwen, [2009] B.C.J. No. 2873, 2009 BCPC 465.

30 R. v. McEwen, [2009] B.C.J. No. 2873, 2009 BCPC 465, at paras. 10, 13–14 (emphasis added).

31 R. v. Lindgrin, 2014 CarswellBC 4347, [2014] B.C.J. No. 3514, 2014 BCSC 1381 (B.C. S.C.), at paras. 222–224.

32 R. v. Shier, 2018 CarswellOnt 6123, [2018] O.J. No. 2099, 2018 ONSC 2425 (Ont. S.C.J.).

33 R. v. Shier, 2018 CarswellOnt 6123, [2018] O.J. No. 2099, 2018 ONSC 2425 (Ont. S.C.J.), at paras. 38–39.

34 R. v. Petraitis, 2010 CarswellOnt 7211, [2010] O.J. No. 6395, 90 W.C.B. (2d) 301, 2010 ONSC 4954 (Ont. S.C.J.).

35 R. v. Petraitis, 2010 CarswellOnt 7211, [2010] O.J. No. 6395, 90 W.C.B. (2d) 301, 2010 ONSC 4954 (Ont. S.C.J.), at paras. 26–28.

36 R. v. Petraitis, 2010 CarswellOnt 7211, [2010] O.J. No. 6395, 90 W.C.B. (2d) 301, 2010 ONSC 4954 (Ont. S.C.J.), at paras. 35–37.

37 R. v. Petraitis, 2010 CarswellOnt 7211, [2010] O.J. No. 6395, 90 W.C.B. (2d) 301, 2010 ONSC 4954 (Ont. S.C.J.), at para. 25.

38 R. v. Petraitis, 2010 CarswellOnt 7211, [2010] O.J. No. 6395, 90 W.C.B. (2d) 301, 2010 ONSC 4954 (Ont. S.C.J.), at para. 25.

39 See **Hubbard**, **Robert**, Susan Magotiaux and Suzanne M. Duncan, The Law of **Privilege** in Canada (Toronto: Canada Law Book, 2006) (looseleaf).

40 R. v. Lucas, [2009] O.J. No. 2252, 84 W.C.B. (2d) 109 (S.C.J.).

41 R. v. Lucas, [2009] O.J. No. 2252, 84 W.C.B. (2d) 109 (S.C.J.), at para. 23 (emphasis added).

42 R. v. Greaves-Bissesarsingh, 2014 CarswellOnt 11454, [2014] O.J. No. 3892, 2014 ONSC 4900 (Ont. S.C.J.).

43 R. v. Greaves-Bissesarsingh, 2014 CarswellOnt 11454, [2014] O.J. No. 3892, 2014 ONSC 4900 (Ont. S.C.J.), at para. 28 (emphasis added).

44 R. v. Brown, 2021 ONCA 119 (Ont. C.A.), at para. 60.

45 R. v. McKay, 2016 CarswellBC 2739, [2016] B.C.J. No. 2042, 2016 BCCA 391 (B.C. C.A.).

46 R. v. McKay, 2016 CarswellBC 2739, [2016] B.C.J. No. 2042, 2016 BCCA 391 (B.C. C.A.), at para. 150 (emphasis added).

47 R. v. Vigneswaralingam, 2017 CarswellOnt 15046, [2017] O.J. No. 4987, 2017 ONCJ 640 (Ont. C.J.).

48 R. v. Vigneswaralingam, 2017 CarswellOnt 15046, [2017] O.J. No. 4987, 2017 ONCJ 640 (Ont. C.J.), at para. 5.

49 R. v. Pilbeam, 2018 CarswellMan 574, [2018] M.J. No. 328, 2018 MBCA 128 (Man. C.A.).

50 R. v. Pilbeam, 2018 CarswellMan 574, [2018] M.J. No. 328, 2018 MBCA 128 (Man. C.A.), at paras. 28–29 and 31 (emphasis added).

51 R. v. Daniels, 2014 CarswellOnt 17778, [2014] O.J. No. 6035, 118 W.C.B. (2d) 158, 2014 ONSC 6542 (Ont. S. C.J.).

52 R. v. Daniels, 2014 CarswellOnt 17778, [2014] O.J. No. 6035, 118 W.C.B. (2d) 158, 2014 ONSC 6542 (Ont. S. C.J.), at paras. 8, 10–11.

53 R. v. Daniels, 2014 CarswellOnt 17778, [2014] O.J. No. 6035, 118 W.C.B. (2d) 158, 2014 ONSC 6542 (Ont. S. C.J.), at para. 18 (emphasis added).

54 R. v. Bahlawan, 2019 CarswellOnt 14337, 2019 ONSC 3743 (Ont. S.C.J.).

55 R. v. Bahlawan, 2019 CarswellOnt 14337, 2019 ONSC 3743 (Ont. S.C.J.), at paras. 53–56 (emphasis added).

56 R. v. Bahlawan, 2019 CarswellOnt 14337, 2019 ONSC 3743 (Ont. S.C.J.), at p. 393.

57 Application to Proceed In Camera (Re) (2007), 224 C.C.C. (3d) 1, 285 D.L.R. (4th) 193 (S.C.C.), at paras. 20–21.

58 See also § 8:21.

59 Nissen v. Durham Regional Police Services Board, 2015 CarswellOnt 2849, [2015] O.J. No. 924, 251 A.C.W.S. (3d) 514, 2015 ONSC 1268 (Ont. S. C.J.), additional reasons 2015 CarswellOnt 5324, 2015 ONSC 2442 (Ont. S. C.J.).

60 Nissen v. Durham Regional Police Services Board, 2015 CarswellOnt 2849, [2015] O.J. No. 924, 251 A.C.W.S. (3d) 514, 2015 ONSC 1268 (Ont. S. C.J.), additional reasons 2015 CarswellOnt 5324, 2015 ONSC 2442 (Ont. S. C.J.), at paras. 1, 329 (emphasis added).

61 John Doe A v. John Doe D, 2017 CarswellOnt 3663, [2017] O.J. No. 1262, 277 A.C.W.S. (3d) 538, 2017 ONSC 1133 (Ont. S.C.J.).

62 John Doe A v. John Doe D, 2017 CarswellOnt 3663, [2017] O.J. No. 1262, 277 A.C.W.S. (3d) 538, 2017 ONSC 1133 (Ont. S.C.J.), at paras. 3 and 16.

63 Doe A v. Toronto Police Services Board, 2019 CarswellOnt 4912, 304 A.C.W.S. (3d) 524, 2019 ONSC 2080 (Ont. Div. Ct.).

64 New Westminster Police Department, Re, 2015 CarswellBC 1594, [2015] O.J. No. 1214, 255 A.C.W.S. (3d) 486, 2015 BCSC 978 (B.C. S.C.).

65 New Westminster Police Department, Re, 2015 CarswellBC 1594, [2015] O.J. No. 1214, 255 A.C.W.S. (3d) 486, 2015 BCSC 978 (B.C. S.C.), at para. 66 (emphasis added).

66 British Columbia (Police Complaint Commissioner) v. Abbotsford Police Department, 2015 CarswellBC 3740, [2015] B.C.J. No. 2806, 2015 BCCA 523 (B.C. C.A.).

67 R. v. B. (A.), 2015 CarswellOnt 13791, [2015] O.J. No. 4597, 124 W.C.B. (2d) 565, 2015 ONSC 5541 (Ont. S.C.J.).

68 R. v. B. (A.), 2015 CarswellOnt 13791, [2015] O.J. No. 4597, 124 W.C.B. (2d) 565, 2015 ONSC 5541 (Ont. S.C.J.), at paras. 82, 110, 115 (emphasis added).

69 R. v. Dewolfe (2011), 943 A.P.R. 364, 297 N.S.R. (2d) 364, 92 W.C.B. (2d) 25, 2011 NSPC 1, [2011] N.S.J. No. 21 (Prov. Ct.).

70 R. v. Dewolfe (2011), 943 A.P.R. 364, 297 N.S.R. (2d) 364, 92 W.C.B. (2d) 25, 2011 NSPC 1, [2011] N.S.J. No. 21, at paras. 4, 18–20 and 25 (emphasis added). A similar analysis and result is found in R. v. Drinkwater (2010), 91 W.C.B. (2d) 585, [2010] O.J. No. 5340, 2010 ONSC 6397 (S.C.J.), at paras. 28 and 32.

71 R. v. Y. (N.), 2012 CarswellOnt 13581, 2012 ONCA 745, [2012] O.J. No. 5165 (Ont. C.A.).

72 R. v. Y. (N.), 2012 CarswellOnt 13581, 2012 ONCA 745, [2012] O.J. No. 5165 (Ont. C.A.), at para. 122.

73 R. v. Lising, 2010 CarswellBC 4393, [2010] B.C.J. No. 2998, 2010 BCCA 390 (B.C. C.A.).

74 R. v. Lising, 2010 CarswellBC 4393, [2010] B.C.J. No. 2998, 2010 BCCA 390 (B.C. C.A.), at paras. 37–38, 40–41.

75 R. v. Sandeson, 2017 CarswellNS 625, [2017] N.S.J. No. 335, 141 W.C.B. (2d) 173, 2017 NSSC 146 (N.S. S.C.); See also R. v. Sandeson, 2017 CarswellNS 627, [2017] N.S.J. No. 337, 141 W.C.B. (2d) 288, 2017 NSSC 196 (N.S. S.C.). (emphasis added).

76 R. v. Sandeson, 2017 CarswellNS 625, [2017] N.S.J. No. 335, 141 W.C.B. (2d) 173, 2017 NSSC 146 (N.S. S.C.).

77 R. v. Sandeson, 2017 CarswellNS 625, [2017] N.S.J. No. 335, 141 W.C.B. (2d) 173, 2017 NSSC 146 (N.S. S.C.), at paras. 119–20 and 124–5 (emphasis added).

78 R. c. Brind'Amour, 2014 CarswellQue 100, 2014 CarswellQue 8326, [2014] J.Q. no 93, EYB 2014-231633, 111 W.C.B. (2d) 814, 2014 QCCA 33 (C.A. Que.), at para. 63–64.

79 R. c. Brind'Amour, 2014 CarswellQue 100, 2014 CarswellQue 8326, [2014] J.Q. no 93, EYB 2014-231633, 111 W.C.B. (2d) 814, 2014 QCCA 33 (C.A. Que.), at paras. 63–64 (emphasis added).

80 See § 5:26 where this issue is also discussed.

81 R. v. McGee (2009), 85 W.C.B. (2d) 368, [2009] O.J. No. 4749 (S.C.J.).

82 R. v. McGee (2009), 85 W.C.B. (2d) 368, [2009] O.J. No. 4749 (S.C.J.), at paras. 19, 21–2.

83 R. c. Lacas, 2011 QCCA 1633, [2011] Q.J. No. 12424, 2011 CarswellQue 9700, 2011 CarswellQue 15771, [2011] J.Q. no 12424, EYB 2011-195595, 97 W.C.B. (2d) 246 (Que. C.A.).

84 R. c. Lacas, 2011 QCCA 1633, [2011] Q.J. No. 12424, 2011 CarswellQue 9700, 2011 CarswellQue 15771, [2011] J.Q. no 12424, EYB 2011-195595, 97 W.C.B. (2d) 246 (Que. C.A.), at paras. 12 and 45 (emphasis added), citing R. v. Scotland, 2007 CarswellOnt 8873, [2007] O.J. No. 5301, 76 W.C.B. (2d) 331 (Ont. S.C.J.), at para. 233.

85 R. v. Milani, [2008] O.J. No. 1400, 78 W.C.B. (2d) 615 (S.C.J.).

86 R. v. Milani, [2008] O.J. No. 1400, 78 W.C.B. (2d) 615 (S.C.J.).

87 R. v. Milani, [2008] O.J. No. 1400, 78 W.C.B. (2d) 615 (S.C.J.), at paras. 10–13 (emphasis added).

88 Section 3.3.2 sets out the nature of the test to be met in establishing reasonable grounds.

89 R. c. Lacas, 2011 QCCA 1633, [2011] Q.J. No. 12424, 2011 CarswellQue 9700, 2011 CarswellQue 15771, [2011] J.Q. no 12424, EYB 2011-195595, 97 W.C.B. (2d) 246 (Que. C.A.), at paras. 8–9.

90 R. c. Lacas, 2011 QCCA 1633, [2011] Q.J. No. 12424, 2011 CarswellQue 9700, 2011 CarswellQue 15771, [2011] J.Q. no 12424, EYB 2011-195595, 97 W.C.B. (2d) 246 (Que. C.A.).

91 R. v. Debot (1986), 30 C.C.C. (3d) 207, 54 C.R. (3d) 120, 17 O.A.C. 141, 26 C.R.R. 275, 17 W.C.B. 398 (Ont. C.A.), affd [1989] 2 S.C.R. 1140, 52 C.C.C. (3d) 193, 73 C.R. (3d) 129, 37 O.A.C. 1, 45 C.R.R. 49, 102 N.R. 161, 8 W.C.B. (2d) 803.

92 R. v. Milani, [2008] O.J. No. 1400, 78 W.C.B. (2d) 615 (S.C.J.) (emphasis added).

93 R. v. Milani, [2008] O.J. No. 1400, 78 W.C.B. (2d) 615 (S.C.J.), at paras. 32–3.

94 R. v. Yong, 2020 CarswellAlta 1790, 2020 ABQB 584 (Alta. Q.B.).

95 R. v. Yong, 2020 CarswellAlta 1790, 2020 ABQB 584 (Alta. Q.B.), at paras. 22–23 (emphasis added).

96 R. v. Black (2010), 255 C.C.C. (3d) 62, [2010] N.B.J. No. 171, 88 W.C.B. (2d) 178, 2010 NBCA 36 (C.A.), leave to appeal to S.C.C. refused [2011] 1 S.C.R. vi, 261 C.C.C. (3d) iv, 969 A.R.R. 400, 375 N.B.R. (2d) 400, 225 C.R.R. (2d) 375*n*, 416 N.R. 366*n*.

97 R. v. Black (2010), 255 C.C.C. (3d) 62, [2010] N.B.J. No. 171, 88 W.C.B. (2d) 178, 2010 NBCA 36 (C.A.), leave to appeal to S.C.C. refused [2011] 1 S.C.R. vi, 261 C.C.C. (3d) iv, 969 A.R.R. 400, 375 N.B.R. (2d) 400, 225 C.R.R. (2d) 375*n*, 416 N.R. 366*n*, at paras. 25–26 (emphasis added).

98 R. v. Loewen, 2016 CarswellBC 2303, [2016] B.C.J. No. 1760, 2016 BCCA 351 (B.C. C.A.).

99 R. v. Loewen, 2016 CarswellBC 2303, [2016] B.C.J. No. 1760, 2016 BCCA 351 (B.C. C.A.), at paras. 43–45 (emphasis added).

100 R. v. Lucas, [2009] O.J. No. 2252, 84 W.C.B. (2d) 109 (S.C.J.).

101 R. v. Lucas, [2009] O.J. No. 2252, 84 W.C.B. (2d) 109 (S.C.J.), at paras. 25–27 (emphasis added).

102 R. v. Windebank, 2014 CarswellOnt 15026, [2014] O.J. No. 5080, 116 W.C.B. (2d) 641, 2014 ONSC 6258 (Ont. S. C.J.).

103 R. v. Windebank, 2014 CarswellOnt 15026, [2014] O.J. No. 5080, 116 W.C.B. (2d) 641, 2014 ONSC 6258 (Ont. S. C.J.), at para. 32.

103.50 R. v. Jones, 2023 CarswellOnt 1591, 2023 ONCA 106.

103.60 R. v. Debot, 1989 CarswellOnt 111, [1989] 2 S.C.R. 1140 at p. 1168.

103.70 R. v. Jones, 2023 CarswellOnt 1591, 2023 ONCA 106, at para. 16, citing R. v. Kebede, 2018 ONSC 6304, at para. 36.

104 R. v. Parsley, 2016 CarswellNfld 382, [2016] N.J. No. 336, 2016 NLCA 51 (N.L. C.A.).

105 R. v. Parsley, 2016 CarswellNfld 382, [2016] N.J. No. 336, 2016 NLCA 51 (N.L. C.A.), at paras. 28, 33 (emphasis added).

106 R. v. MacDonald (2012), 100 W.C.B. (2d) 921, [2012] O.J. No. 1673, 2012 ONCA 244 (Ont. C.A.).

107 R. v. MacDonald (2012), 100 W.C.B. (2d) 921, [2012] O.J. No. 1673, 2012 ONCA 244 (Ont. C.A.), at paras. 7–8 (emphasis added).

108 R. v. MacDonald (2012), 100 W.C.B. (2d) 921, [2012] O.J. No. 1673, 2012 ONCA 244 (Ont. C.A.), at paras. 18 and 20–4 (emphasis added).

108.50 R. v. Jones, 2023 CarswellOnt 1591, 2023 ONCA 106.

108.60 R. v. Jones, 2023 CarswellOnt 1591, 2023 ONCA 106, at para. 20.

109 R. v. Cook (2014), 307 C.C.C. (3d) 495, 119 O.R. (3d) 168, 2014 CarswellOnt 2435, [2014] O.J. No. 963, 112 W.C.B. (2d) 1, 2014 ONCA 170 (Ont. C.A.).

110 R. v. Cook (2014), 307 C.C.C. (3d) 495, 119 O.R. (3d) 168, 2014 CarswellOnt 2435, [2014] O.J. No. 963, 112 W.C.B. (2d) 1, 2014 ONCA 170 (Ont. C.A.), at paras. 15–20 (emphasis added).

111 Enache v. Canada (Citizenship and Immigration), 2019 CarswellNat 591, [2019] F.C.J. No. 246, 2019 FC 182 (F.C.).

112 Enache v. Canada (Citizenship and Immigration), 2019 CarswellNat 591, [2019] F.C.J. No. 246, 2019 FC 182 (F.C.), at paras. 14–15 (emphasis added).

113 R. v. Khan, 2013 CarswellBC 4151, [2013] B.C.J. No. 3066, 2013 BCSC 387 (B.C. S. C.).

114 R. v. Khan, 2013 CarswellBC 4151, [2013] B.C.J. No. 3066, 2013 BCSC 387 (B.C. S. C.), at paras. 23, 32 and 34 (emphasis added).

115 Her Majesty the Queen v. Named Person A, 2017 CarswellAlta 1642, [2017] A.J. No. 944, 2017 ABQB 552 (Alta. Q.B.).

116 Her Majesty the Queen v. Named Person A, 2017 CarswellAlta 1642, [2017] A.J. No. 944, 2017 ABQB 552 (Alta. Q.B.), at paras. 29–33.

117 R. v. Golding, 2017 CarswellOnt 10602, [2017] O.J. No. 3559, 140 W.C.B. (2d) 554, 2017 ONSC 3016 (Ont. S.C.J.).

118 R. v. Golding, 2017 CarswellOnt 10602, [2017] O.J. No. 3559, 140 W.C.B. (2d) 554, 2017 ONSC 3016 (Ont. S.C.J.), at para. 5 (emphasis added).

119 R. v. Noel de Tilly, 2015 CarswellBC 2422, [2015] B.C.J. No. 1822, 124 W.C.B. (2d) 37, 2015 BCSC 1500 (B.C. S.C.).

120 R. v. Noel de Tilly, 2015 CarswellBC 2422, [2015] B.C.J. No. 1822, 124 W.C.B. (2d) 37, 2015 BCSC 1500 (B.C. S.C.), at paras. 14–17, 19–20.

121 R. v. Noel de Tilly, 2015 CarswellBC 2422, [2015] B.C.J. No. 1822, 124 W.C.B. (2d) 37, 2015 BCSC 1500 (B.C. S.C.), at para. 28.

122 R. v. Noel de Tilly, 2015 CarswellBC 2422, [2015] B.C.J. No. 1822, 124 W.C.B. (2d) 37, 2015 BCSC 1500 (B.C. S.C.), at paras. 27, 33–35.

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Law of Privilege in Canada § 2:57

Law of Privilege in Canada
Robert W. **Hubbard**, Katie Doherty

Chapter 2. Informer Privilege

VI. Protecting Informants

K. Staying Proceedings to Protect Informants; Protecting Informers Who Plead Guilty

§ 2:57. Staying Proceedings to Protect Informants

In *Scott*, [1] the Supreme Court upheld the use of the Crown's power to stay proceedings under s. 579 of the *Code* as a proper means to protect **informer privilege**.

In *Scott*, three judges dissented on the issue of whether the use of stay was appropriate as a means to protect the **privilege**. McLachlin J. characterized the issue as follows: [2]

> The only question is whether the Crown's conduct in entering a stay and then recommencing the proceedings for the purpose of avoiding an unfavourable evidentiary ruling constitutes an abuse of process or violates the Charter, with the result that the convictions should be set aside. *The issue, as I see it, is whether, once an accused has been put in jeopardy by entering a plea to a charge, the Crown may stay that proceeding and institute a new proceeding in order to overcome an unfavourable ruling by the trial judge.*

McLachlin J. found that the use of the stay power to protect **informers** in the middle of the trial encouraged judge shopping. Instead, she advocated an appeal as the proper remedy. She stated: [3]

> *The remedy is by way of appeal.* To permit the Crown to stay a proceeding because of an unfavourable ruling and then reinstate the proceeding before a different judge in the hope of a different ruling is obviously to condone, in some sense, judge-shopping, notwithstanding that the Crown's motive may have been honourable.
>
> Such conduct also raises concern for the impartiality of the administration of justice, real and perceived. The use of the power to stay, combined with reinstitution of proceedings as a means of avoiding an unfavourable ruling, gives the Crown an advantage not available to the accused. *An accused's only remedy for an unfavourable ruling is an appeal: the Crown, if conduct such as that raised in this case is condoned, has a choice of whether to stay and start afresh before a new judge or to appeal.*

In response to the majority's conclusion that the stay of proceedings was a valid method of protecting **privilege**, the dissenters noted: [4]

> The Crown, faced with the evidentiary ruling which might have led to disclosure of the **informer's** identity, could have stood the witness down and declined to call further evidence. The result would probably have been an acquittal. The Crown then could have appealed the acquittal on the ground of the judge's erroneous ruling in the usual way, asking for a new trial. This is what happened in *R. v. Banas and Haverkamp* (1982), 65 C.C.C. (2d) 224, 36 O.R. (2d) 164. There the Ontario Court of Appeal allowed an appeal from an acquittal made after the Crown declined to lead evidence following an adverse ruling. Martin J.A. stated at p. 169:

> We do not think that the Crown, in the circumstances, is precluded from appealing the directed verdict because Crown counsel decided not to continue with the trial which he considered would be fruitless and which would not result in a conviction due to the erroneous exclusion of vital evidence. We are satisfied that if the trial judge had not excluded the evidence of the intercepted private communications the verdict of the jury would not necessarily have been the same.
>
> ....
>
> I conclude that the Crown's conduct in staying the proceedings to avoid an adverse judicial ruling and then recommencing them establishes the case for abuse of process.

While the dissenting view recommends itself as a possible alternative to entering a stay of proceedings, it does not envisage the problematic judge who refuses to permit the Crown to call no further evidence. In *Scott*, for instance, the stay was entered because the judge refused to hear the Crown's submissions why **informer privilege** was at stake. If a judge refuses to hear submissions, he or she could similarly deny the witness the right to stand down and deny the Crown the right to call no further evidence. Accordingly, while the dissenting opinion may provide a useful alternative method of dealing with the protection of **informer privilege**, a stay of proceedings remains a vital protection for **informers**.

In some instances, judges have also instituted a stay of proceedings to protect **informers** when the court has been satisfied that material should be made available to make full answer and defence but cannot because it is cloaked by **privilege**. [5]

Footnotes

1 R. v. Scott (1990), 61 C.C.C. (3d) 300, [1990] 3 S.C.R. 979.

2 R. v. Scott (1990), 61 C.C.C. (3d) 300, [1990] 3 S.C.R. 979, at p. 322 (emphasis added).

3 R. v. Scott (1990), 61 C.C.C. (3d) 300, [1990] 3 S.C.R. 979, at p. 324 (emphasis added).

4 R. v. Scott (1990), 61 C.C.C. (3d) 300, [1990] 3 S.C.R. 979, at pp. 327–328, 329.

5 R. v. Whelan (2004), 240 Nfld. & P.E.I.R. 347, [2004] N.J. No. 322 (QL) (S.C.T.D.).

A PRACTICAL GUIDE TO *STARE DECISIS*

The Honourable Justice Malcolm Rowe and Leanna Katz*

I. *STARE DECISIS*: AN INTRODUCTION

The doctrine of *stare decisis* asks judges to look back to cases that have been decided as a guide to judging the case before them. The term comes from the Latin phrase *stare decisis et non quieta movere*, which means "to stand by decisions, and not to disturb settled points."[1] *Stare decisis* is often described as incorporating a tension between certainty—on the one hand—and achieving a just result on the other. The idea of certainty and the correction of error (to achieve a just result) as competing forces was captured by the Supreme Court of Canada in 2012 in *Canada v Craig*: "The Court must ask whether it is preferable to adhere to an incorrect precedent to maintain certainty, or to correct

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Leanna Katz graduated with a B.A.Sc. from McMaster University in 2012. She worked as a non-partisan intern for two Members of Provincial Parliament at the Ontario Legislative Assembly in 2012-13. She received her law degree from the University of Toronto in 2016. Leanna clerked at the Court of Appeal of British Columbia in 2016-17, and then worked in litigation in 2017-18, before clerking for Justice Rowe at the Supreme Court of Canada in 2018-19. Leanna is an LL.M. Candidate at Harvard Law School.

[1] Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed, (St. Paul, Minn: Thomson Reuters, 2019) sub verbo "*stare decisis et non quieta movere*".

the error."[2] Legal scholar Wolfgang Friedmann characterized the "basic problem of any civilized legal system":

> All laws oscillate between the demands of certainty−which require firm and reliable guidance by authority−and the demands of justice, which require that the solution of an individual case should be equitable and conform to current social ideals and conceptions of justice. Every legal system must compromise between these two pulls; it must balance rigidity with flexibility.[3]

In what follows, we offer a guide to the Canadian approach to *stare decisis*.[4] We first explain its elements and then provide practical guidance on its application. We suggest that the competing demands of certainty and correctness yield a productive tension that helps to answer the questions: When does a precedent decide the case before a judge? And when should a judge distinguish or overturn precedent? The principles of *stare decisis* direct when to stay the course and when to set out, at least in part, in a new direction.

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[2] *Canada v Craig*, 2012 SCC 43 at para 27 [*Craig*].

[3] Wolfgang Friedmann, "*Stare Decisis* at Common Law and under the *Civil Code of Quebec*" (1953) 31:7 Can Bar Rev 723 at 723.

[4] This article focuses on the common law approach to *stare decisis* rather than the civil law approach; See Claire L'Heureux-Dubé, "By Reason of Authority or by Authority of Reason" (1993) 27:1 UBC L Rev 1 ("the civilian tradition favours the spirit and content of civil legislation as well as doctrine over strict adherence to judicial precedents" at 1); Albert Mayrand, "L'autorité du précédent au Québec" (1992) 28:2 RJT 771 ("Dans les pays de droit civil, le précédent est moins autoritaire. II ne commande pas, il recommande qu'on le suive. … En common law le précédent s'impose comme une règle, en droit civil il se présente comme un module proposé" at 773). Other scholars suggest that, in practice, the difference in the treatment of precedent in Canadian common law compared to civil jurisdictions is less significant; see D Neil MacCormick & Robert S Summers, eds, *Interpreting Precedents: A Comparative Study* (Aldershot: Ashgate Publishing, 1997), cited in Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008) ("In theory, the attitude of the common law provinces [of Canada] regarding the authority of precedent remains different from that of Quebec. But in fact, these attitudes are now very similar, owing to the relaxation of the doctrine of stare decisis and, even in civil law countries, the considerable growth of the role of case-law" at 13, n 33).

We observe, reflecting on the principles of *stare decisis*, that the destination of the law is not an immutably fixed point. Over time—sometimes a very long time—the law evolves, not so much in its foundational concepts, but in the edifice erected, repaired, and, from time to time, rebuilt upon its enduring foundations. The doctrine of *stare decisis* is a guide to charting the appropriate path, based on the line of reasoning laid down in the law and the relevant circumstances. Properly understood and applied, the doctrine of *stare decisis* serves both aims of certainty and achieving a just result. As Justice Sharpe so aptly states:

> Precedent is a foundational principle of the common law. But the weight attached to precedent cannot be reduced to a set of mechanical rules. It is the starting point to legal analysis. For most disputes, precedent will be decisive. But the capacity of the common law to evolve is inconsistent with rigid, unbending adherence to past decisions. We must keep in mind that the ultimate purpose of precedent is to foster certainty, predictability, and coherence in the law. Blind adherence to *stare decisis* may not only perpetuate an unjust rule but may also conflict with the very purpose of the doctrine itself.[5]

We begin by providing some background on the doctrine of *stare decisis,* in particular, its rationales and history.

a. Rationales for stare decisis

The oft-cited rationales for *stare decisis* concern "consistency, certainty, predictability and sound judicial administration."[6] As Justice Laskin stated, "[a]dherence to precedent promotes these values. The more willing a court is to abandon its own previous judgments, the greater the prospect for confusion and uncertainty ... People should be able to know the law so that they can conduct themselves in accordance with it."[7]

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[5] Robert Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 168.
[6] *David Polowin Real Estate Ltd v The Dominion of Canada General Insurance Co* (2005), 76 OR (3d) 161 at 191–92, 255 DLR (4th) 633 (CA) [*Polowin*].
[7] *Ibid* at 192.

The justification for *stare decisis* often sounds in the theme of keeping the law settled. In other words, by adhering to precedent, judges keep the law certain and predictable.[8] Yet certainty as to the law and predictability as to the outcome—while related—are conceptually distinct. Each case raises a new factual scenario, which makes it difficult to predict the outcome—no matter how certain the law may be. Furthermore, it is not necessarily desirable to apply precedent rigidly in the name of certainty and predictability. As Lord Atkin stated: "Finality is a good thing but justice is a better."[9]

Other rationales for *stare decisis* include: administrative efficiency (limiting what goes on the judicial agenda and improving efficiency by applying cases where the legal question has been decided in the past);[10] judicial humility (knowing "we are no wiser than our ancestors" and perhaps made wiser by learning from how they have decided past cases); [11] and judicial comity (judges treating fellow judges' decisions with courtesy and consideration).[12] The importance of each rationale varies by level of court.

The means by which judges maintain the law as settled is by treating like cases alike. This allows individuals to plan their affairs, lawyers to advise clients, and citizens to interact with the legal system based on a set of reasonable expectations.[13] Aristotle considered it to be a basic element of justice to treat like cases alike.[14] Philosopher Jeremy Waldron frames the concern with keeping the law settled in terms of coherently articulating and applying norms: "[it] is not just about consistency. Instead, it is a principle that commands judges to

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[8] Duxbury, *supra* note 4 at 159.

[9] *Ras Behari Lal v King Emperor*, [1933] UKPC 60, [1933] All ER Rep 723 at 726 (PC), cited in Joseph J Arvay, Sheila M Tucker & Alison M Latimer, "Stare Decisis and Constitutional Supremacy: Will Our Charter Past Become an Obstacle to Our Charter Future?" (2012) 58:2 SCLR (2d) 61 at 68, online: *Osgoode Digital Commons* <digitalcommons.osgoode.yorku.ca/sclr/vol58/iss1/2/>.

[10] Jeremy Waldron, "*Stare Decisis* and the Rule of Law: A Layered Approach" (2012) 111:1 Mich L Rev 1 at 4, citing Henry Paul Monaghan, "Stare Decisis and Constitutional Adjudication" (1988) 88:4 Colum L Rev 723 at 744–52; Frederick Schauer, "Precedent" (1987) 39:3 Stan L Rev 571 at 572–73.

[11] Waldron, *supra* note 10 at 4.

[12] *Re Hansard Spruce Mills Ltd*, [1954] 4 DLR 590 at 592, [1954] BCJ No 136 (QL) (SC) [*Re Hansard*].

[13] Duxbury, *supra* note 4 at 162.

[14] *Ibid* at 36, citing Aristotle, *Nicomachean Ethics*, V 2 1131^{a}–1131^{b}.

work together to articulate, establish and follow general legal norms."[15] This framing recalls the historical view of *stare decisis.*

b. Historical view of stare decisis

Before turning to the how-to guide, a brief historical account of *stare decisis* can help illuminate our discussion. The doctrine of *stare decisis* began to take shape in England in the 18th century and crystallized as a rule in the late 19th century.[16]

Before that, common law judges were guided more generally by past experience. The 17th century view considered whether a decision fit coherently in the common law. Sir Matthew Hale said that the reason and certainty of the law depended on judges "keep[ing] a constancy and consistency of the law itself." Professor Neil Duxbury added, not in the sense of like cases being treated alike, but in judgments being consistent with the law as a whole.[17] Hale said of 17th century common law thought: although judicial decisions bind "as a Law between the Parties thereto . . . they do not make a Law properly so called, (for that only the King and Parliament can do)." While Hale did not think that individual rulings had the authority of law, "they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is."[18]

Before the recognition of the formal doctrine of *stare decisis*, the main constraint on legal decision-making was the view that "precedents and usages do not rule the law, but the law rules them" and its companion *non exemplis sed rationibus adjudicandum est*—judging follows reason not examples.[19] In other

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[15] Waldron, *supra* note 10 at 4.
[16] Duxbury, *supra* note 4 at 25.
[17] *Ibid* at 48–49, quoting Gerald J Postema, "Classical Common Law Jurisprudence (Part I)" (2002) 2:2 OUCLJ 155 at 178.
[18] *Ibid* at 50, citing Sir Matthew Hale, *The History of the Common Law of England* (Chicago: Chicago University Press, 1971 [1713]) at 45.
[19] *Ibid* at 51; see *Rust v Cooper*, (1777) 98 ER 1277 at 1279, (1777) 2 Cowp 629 (KB) [*Rust*].

words, judicial decisions were the best *evidence* of the law, rather than being the law itself.[20]

In the 18th and 19th centuries, precedent became the dominant form of authority in legal argument. Past decisions offered reasons for particular rules and doctrines.[21] The growth of the doctrine of *stare decisis* was related to the increase of law reports, which made prior cases more accessible and, thereby, more reliable sources of authority for courts to consider.[22]

While judges today consider themselves bound by precedent, *stare decisis* is not a constitutional or statutory requirement. Rather, precedents bind because judges "consider themselves to be bound by them, or at least bound to take account of them."[23] As Professor Carleton Kemp Allen said: "We say that [the judge] is bound by the decisions of higher Courts; and so he undoubtedly is. But … he places the fetters in his own hands…"[24] Thus, *stare decisis* is as important as it is today in part because judges have made it so.

II. THE ELEMENTS OF *STARE DECISIS*

Turning now to its elements, *stare decisis* consists of two conventions—the vertical and the horizontal. There is also the related matter of distinguishing between the *ratio decidendi* and *obiter dicta*.

a. The vertical and horizontal conventions

According to the vertical convention, lower courts must follow decisions of higher courts. This rule gives practical effect to the hierarchical court structure. In Canada, only the vertical convention of *stare decisis* is strictly binding. The horizontal convention, in contrast, provides that decisions from the same level

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[20] *Ibid*; see *Jones v Randall*, (1774) 98 ER 706, (1774) Lofft 383 (per Lord Mansfield, "precedent, though be evidence of law, is not law itself, much less the whole of the law" at 707).
[21] Duxbury, *supra* note 4 at 55–57.
[22] *Ibid* at 53–54.
[23] *Ibid* at 15.
[24] *Ibid* at 15, n 44, citing Carleton Kemp Allen, *Law in the Making*, 3rd ed (Oxford: Clarendon Press, 1939) at 247–48.

of court should be followed unless there is compelling reason not to do so.[25] As a related matter, decisions from courts outside the direct hierarchy of the decision-making court are persuasive rather than binding authority. For example, the British Columbia Court of Appeal and the Supreme Court of British Columbia are not bound to follow the Court of Appeal for Ontario, but those decisions may well assist the court in reaching a decision.[26]

b. What the case stands for: ratio decidendi versus obiter dicta

For all decisions, it is essential to identify the *ratio decidendi* and *obiter dicta* to understand whether and how the precedent applies. The Latin term *ratio decidendi* means "the reason for deciding" and *obiter dicta* means "something said in passing."[27] Courts are bound only to follow what was actually decided in earlier cases—that is, the *ratio decidendi*. Courts are not bound to follow *obiter dicta*, what was merely said in passing—as it is by definition not part of the reasoning by which the result was determined. Drawing the line between *ratio* and *obiter dicta* is a key, and at times challenging, aspect of working with the doctrine of *stare decisis*.

III. A GUIDE TO WORKING WITH THE DOCTRINE OF *STARE DECISIS*

Getting oriented: Determining which court made the decision

The initial step when working with the doctrine of *stare decisis* is to identify which court made the earlier decision. If it is a decision of a higher court, then the vertical convention applies, and if it is a decision of the same court, the horizontal convention applies. In either situation, the precedent is generally followed, unless it can be distinguished or should be overturned (of which more below). Working under the vertical or the horizontal convention, the first step

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[25] Debra Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2006) 32:1 Man LJ 135 at 137.
[26] *Ibid* at 137–38.
[27] Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed, (St. Paul, Minn: Thomson Reuters, 2019) sub verbo "*ratio decidendi*", "*dictum*".

is to ascertain what part of the decision is the binding *ratio decidendi* and what parts are *obiter dicta.*

Step 1: What does the case decide? Ratio versus obiter dicta

Having first considered what court made the decision, a lawyer, judge or law student looking to rely on the decision asks: what did the case decide? It is easy to state the rule that only the *ratio decidendi* is binding and all else is *obiter dicta*. However, drawing the line between the two is not always straightforward.

The Supreme Court of Canada addressed the difference between *ratio* and *obiter dicta* in *R v Henry*, describing the *ratio* as "generally rooted in the facts of the case" bearing in mind that "the legal point decided … may be … narrow … or … broad."[28] *Obiter dicta*, meanwhile, refers to statements in the reasons that are not necessary to dispose of the case. The key distinction is whether the relevant principle of law is the reason for the decision, or extraneous to the matter decided.[29]

Drawing the line between the *ratio* and *obiter dicta* is "a matter of argument and judgment."[30] Determining the *ratio* will often be straightforward. However, it may not be clear how to identify the *ratio* if a judge provides several lines of reasoning (sometimes in the alternative) for the result. Judges may also read a case differently and disagree about what principle the case establishes. Notwithstanding the difficulty on occasion of identifying the *ratio*, it is a necessary first step in working with precedent. The exercise of distinguishing between the *ratio* and *obiter dicta* allows navigating between when to keep the law settled and when to develop the law.[31]

What is considered to be binding tends to vary with the level of court. Lower courts are generally most involved with the facts of the case. Therefore, their decisions are read as deciding a matter based on the facts, often without

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[28] 2005 SCC 76 at para 57 [*Henry*].
[29] Duxbury, *supra* note 4 at 67, citing William Fulbeck, *Direction, or Preparative to the Study of Law* (London: Clarke, 1829 [1600]) at 237–38 (in 1600, William Fulbeck distinguished between 'the principal points' and the 'bye-matters' in a case, and 75 years later, Vaughan CJ argued that 'bye-matters' are of little or no consequence).
[30] Sharpe, *supra* note 5 at 149–50.
[31] *Ibid* at 150.

speaking to the law more broadly. A judge looking to a lower court decision must determine how to apply the *ratio* from that decision to the case before them.[32]

Intermediate appellate courts hear appeals on questions of law, but more generally on the proper application of the law to the facts of the case under appeal. The *ratio* may speak to a broader legal point, but often relates to the proper application of settled law, rather than to the making of new law (e.g. the creation of a precedent). That said, considered *obiter* from an intermediate appellate court should be respected, particularly when the court has surveyed the law with a view to clarifying it.[33]

Finally, Supreme Court of Canada decisions tend to address an area of law in greater depth. This is because of the leave process: in order for the Supreme Court to grant leave, the case must raise a matter of public importance. As such, Supreme Court decisions often reflect a consideration of broader legal questions and speak to the formulation of the law beyond what is required by the facts of the case. In this way, the Supreme Court plays more of a law-making role compared to other Canadian courts—not in the sense that legislatures make law, but rather by making definitive statements as to the meaning and operation of the law, statements which constitute precedents binding on all courts in the relevant jurisdiction, often the whole country.

To the question of how to read a court decision, a higher court decision that reflects a considered view of the law and is intended to provide guidance is seen as binding. This is based on the idea that the common law develops by experience. Lower courts apply the law to new facts and the common law accumulates wisdom to articulate legal principles, which develop over time. As Justice Sharpe states: "[i]t is through the crucible of the common law fact-specific method that we determine the precedential value of a prior decision."[34]

Justice Binnie in *R v Henry* addressed how to treat considered *obiter dicta* from the Supreme Court of Canada:

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[32] *Ibid* at 149.
[33] *Ibid* at 154.
[34] *Ibid* at 152.

> All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity.[35]

We offer the view, which we see in full accord with *Henry*, that to the extent a statement in a decision reflects the court's *considered* view of an area of law, it provides guidance that should be treated as binding. That is, where the Supreme Court turns its full attention to an issue and deals with it definitively, the concepts of *ratio* and *obiter* tend to lose significance. Similarly, where an issue is dealt with in passing, even where it is part of the *ratio*, we would see it as having weak precedential value. Often, when preparing reasons for decision, there is discussion not merely of what the court needs to decide in order to dispose of a given case, but of what further guidance can usefully be given with the case at hand as a vehicle for the purpose.

Drawing the line between *ratio* and *obiter* is a key step in deciding whether an earlier decision applies to, and governs, the case at bar. From the foregoing, one can see that this requires careful attention to a series of considerations.

Step 2: When to distinguish or overrule precedent?

If a court determines that it cannot or ought not follow a prior decision, it may either distinguish or overrule it. Distinguishing a prior decision means interpreting its *ratio* to show that it does not apply in the case before the judge.[36] Overruling, by comparison, is a far bolder step amounting to repealing an earlier

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[35] *Henry*, *supra* note 28 at para 57 (this statement was in response to perceived confusion following *Sellars v R*, [1980] 1 SCR 527 at 529–30, 110 DLR (3d) 629, where Justice Chouinard wrote that when the SCC had ruled on a question of law, though not necessary to dispose of the appeal, that ruling was binding on lower courts).

[36] Duxbury, *supra* note 4 at 27.

decision. Judges are expected to give reasons explaining why they departed from precedent.[37] Courts confine overruling to specific circumstances, discussed below.

a. Distinguishing precedent

Courts show that there is good reason not to follow a precedent by drawing a distinction and then explaining why the distinction is material.

Facts are important to determine whether to distinguish a prior decision or how far to follow it. That said, the same facts are unlikely to occur twice. As Friedmann states, "it does not often happen that a sash cord of a window breaks in identical circumstances and causes comparable injuries."[38] A precedent may not apply analogously if the factual scenario is sufficiently different. Justice Dickson said in a 1980 speech: "By the genius of distinguishing facts the courts escaped the folly of perpetuating to eternity, principles unsuited to modern circumstances."[39] So, one must ask, are the facts of the earlier case appropriate to analogize to the present case, or are they distinguishable?

Neil Duxbury describes there being two ways to distinguish precedent. First, distinguishing *between* cases—showing that factual differences between the prior case and the instant case make the *ratio* of the prior case inapplicable to the present case (as we are discussing in this section).[40] Second, distinguishing *within* a case, which involves differentiating the *ratio decidendi* from *obiter dicta* (as discussed above). To distinguish within a case, a court may take a different view of how to separate the material facts from the facts that are not material to a decision, or the court may make a particular ruling depend on the presence of a more extensive range of material facts (and in doing so, the

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[37] *Ibid* at 112, citing Schauer, *supra* note 10 at 580–81 (Schauer describes precedent as placing an "argumentative burden" on judges to explain how the precedent ought to be treated. Duxbury says the fact that a judge explicitly departs from a precedent might be considered evidence that the precedent has authority; precedents would be devoid of authority if judges felt no need to offer reasons for not following them).

[38] Friedmann, *supra* note 3 at 732.

[39] Sharpe, *supra* note 5 at 150, citing Brian Dickson, "The Role and Function of Judges" (1980) 14 L Soc'y Gaz 138 at 182.

[40] Duxbury, *supra* note 4 at 113.

precedent is less often applicable).[41] This is sometimes called "restrictive distinguishing." [42] A judge distinguishing a precedent in this manner has developed the law.[43]

Note the emphasis on *material* facts. In order to distinguish a case, a lawyer or judge must address, in a specific and structured way, why the facts are material to the decision. Often, this is not done. Failing to do so is a failure of effective advocacy, as this is an important way by which to persuade a court to find a prior decision either applicable or inapplicable.

Distinguishing a case generally does not disturb the authority of the precedent. Rather, it conveys that the case is "good but inapplicable law."[44] Overruling a case, by contrast, is a direct refutation of a precedent. Courts have limited overruling to specific circumstances; the rules differ for each level of court.

b. Vertical convention: Overruling precedent from a higher court

Under the vertical convention, lower courts are required to follow precedents from higher courts. This means that all appellate, superior, federal and provincial courts should follow decisions of the Supreme Court of Canada (as well as pre-1949 decisions of the Judicial Committee of the Privy Council that

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[41] *Ibid* at 115.

[42] Parkes, *supra* note 25 at 141–42, citing Paul Perell, "Stare Decisis and Techniques of Legal Reasoning and Legal Argument" (1987) 2:2–3 Leg Research Update 11, online: *CanLII* <commentary.canlii.org/w/canlii/2018CanLIIDocs161> (both authors point to the illustration of restrictive distinguishing in *Anns Merton v London Burough*, [1977] UKHL 4, which is cited as authority for the proposition that a municipality may be liable in negligence where it fails to properly inspect building plans. The case *Peabody Fund v Sir Lindsay Parkinson Ltd*, [1983] UKHL 5, added the requirement of a possible injury to safety and health—thus narrowing the scope of the municipality's liability, as defined in the *Anns* case).

[43] Duxbury, *supra* note 4 at 115 (this is not to say that judges distinguish a case because they seek to develop the law; rather they tend to distinguish in order to reach what they see as the right outcome).

[44] *Ibid* at 114–15 (although distinguishing may lead lawyers and judges to consider the authority of a case to be weakened; a precedent may come to lack authority because it is "very distinguished"); see also Patrick Devlin, *The Judge* (Oxford: Oxford University Press, 1981) at 92–3.

have not been overruled by the Supreme Court).[45] It is generally accepted that courts that are not final should follow precedent more strictly than final courts of appeal. Courts are bound by the decisions of courts higher in the judicial hierarchy, as well as their own prior decisions, aside from exceptional cases.

The vertical convention of *stare decisis* provides that judges should follow prior decisions even if they disagree with them. Lord Reid, following a common law decision from which he dissented, stated: "I still think the decision was wrong … But I think that however wrong or anomalous the decision may be it must stand … unless and until it is altered by Parliament."[46] In our view, this is preferable to repeating one's dissent each time the issue arises.[47] The practice of "anticipatory overruling", that is, where a lower court is of the view that the higher court will overrule its own precedent when given the opportunity, is inconsistent with vertical *stare decisis.* In effect, a court that pre-emptively "overrules" the higher court decision is refusing to follow precedent (a lower court could not overrule a decision of a higher court). While following an apparently incorrect decision may create a sense that a litigant will suffer an unjust result, it is a feature of our hierarchal system that the issue can make its way to the highest court at which point the law will develop.[48]

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[45] Parkes, *supra* note 25 at 138 (for the SCC, pre-1949 JCPC decisions operate based on a horizontal convention because the SCC is now the final court of appeal with the power to overrule its own decisions and those of the JCPC. See *Reference re Agricultural Products Marketing Act*, [1978] 2 SCR 1198, 84 DLR (3d) 257. Until 1966, the House of Lords held itself to be bound by its own prior decisions, but in 1966 assumed the power to refuse to follow its prior decisions (the House of Lords was replaced by the Supreme Court of the United Kingdom in 2005). The Privy Council never regarded itself as bound by its own prior decisions); see also Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2017) (supplement 2019) vol 1, ch 8.2.

[46] Sharpe, *supra* note 5 at 152, citing *Knuller (Publishing, Printing and Promotions) Ltd v DPP*, [1972] 2 All ER 898 at 903, [1972] 3 WLR 143, Lord Reid.

[47] *Ibid* (Justice Sharpe shares this view at 152).

[48] Parkes, *supra* note 25 at 144; Sharpe, *supra* note 5 at 167 (in *Canada v Craig*, 2011 FCA 22, the Federal Court of Appeal dealt with a case, *Moldowan v Canada*, [1978] 1 SCR 480, 77 DLR (3d) 112, where the interpretation of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) had been the object of criticism. The FCA had considered *Moldowan* in 2006 and decided not to follow it (in *Gunn v Canada*, 2006 FCA 281). The FCA 2011 panel decided that it was bound to follow its 2006 decision and not the SCC decision. The SCC in *Craig*, *supra* note 2, held the FCA was wrong in 2006 and 2011. It was for the SCC to overrule itself, and it did so. At paragraph 21, Justice Rothstein stated: "what the court in this case ought to have done was to

In recent years, the Supreme Court of Canada has provided guidance about when trial courts may depart from decisions of higher courts. Some scholars and judges have commented that the Court appears to be taking a more flexible approach to *stare decisis*.[49] In *Carter*, *Bedford*, and *Comeau*, the Supreme Court commented on vertical *stare decisis*. It is worth recounting what happened in each case in order to describe the state of the law.

In *Canada (Attorney General) v Bedford*,[50] the Court considered the constitutionality of *Criminal Code* prohibitions relating to prostitution (the prohibition on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution). The trial judge held that the earlier SCC advisory opinion in the 1990 *Prostitution Reference*,[51] which upheld the bawdy-house and communication laws, did not preclude her from reconsidering the constitutionality of these provisions.[52] The Supreme Court upheld her decision. It reasoned that certainty in the law is not disturbed when a trial judge considers a new legal issue—here, the trial judge was faced with the question of whether the laws violated the section 7 security of the person interest, whereas only the liberty interest was at issue in the earlier *Prostitution Reference.*[53] In *Bedford*, the Court stated that the trial judge was entitled to revisit a matter decided by the Supreme Court where (1) "new legal issues are raised as a consequence of significant developments in the law," or (2) "there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."[54]

In *Carter v Canada (Attorney General)*,[55] the Court considered the constitutionality of the *Criminal Code* prohibition on physician-assisted

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have written reasons as to why *Moldowan* was problematic, in the way that the reasons in *Gunn* did, rather than purporting to overrule it").

[49] Debra Parkes, "Precedent Revisited: *Carter v Canada (AG)* and the Contemporary Practice of Precedent" (2016) 10:1 McGill JL & Health 123 at 123, 146–47; Sharpe, *supra* note 5 at 161–66.

[50] *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*].

[51] *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, [1990] SCJ No 52 (QL).

[52] *Bedford*, *supra* note 50 at para 17.

[53] *Ibid* at para 45.

[54] *Ibid* at para 42.

[55] *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*].

suicide. The trial judge found the prohibition unconstitutional under section 7 of the *Charter*, although the Supreme Court had (ten years earlier) found the prohibition constitutional in *Rodriguez v British Columbia (Attorney General)*.[56] The Supreme Court, applying the holding from *Bedford*, held the trial court was entitled to reconsider a settled ruling of a higher court as both conditions from *Bedford* were satisfied.[57] Here, the Court described the doctrine of *stare decisis*: "[t]he doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis."[58]

Finally, in *R v Comeau*,[59] the issue was the constitutionality of a provision restricting access to liquor from other provinces. The trial judge held that "new evidence" from a historian about the intentions of the drafters of the prohibition provided a basis to depart from the Supreme Court's prior decision in *Gold Seal v Alberta*,[60] under the "evidence-based exception to vertical *stare decisis* approved in *Bedford*."[61] The Supreme Court disagreed. The historical evidence was "not evidence of changing legislative and social facts or some other fundamental change" that would "justify departing from vertical *stare decisis*."[62] The Court clarified that a fundamental change in circumstances that justifies departing from vertical *stare decisis* is a "high threshold"[63] and that "new evidence must 'fundamentally shif[t]' how jurists understand the legal question at issue. It is not enough to find that an alternate perspective on existing evidence might change how jurists would answer the same legal question."[64]

These three cases address the approach to vertical *stare decisis* in constitutional cases. Although the threshold is high, it is not unattainable if

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[56] *Rodriquez v British Columbia (AG)*, [1993] 3 SCR 519 at para 4, 107 DLR (4th) 342.
[57] *Carter*, *supra* note 55 at para 44.
[58] *Ibid.*
[59] *R v Comeau*, 2018 SCC 15 [*Comeau*].
[60] *Gold Seal Ltd v Dominion Express Co*, [1921] 62 SCR 424, 62 DLR 62.
[61] *Comeau*, *supra* note 59 at para 17.
[62] *Ibid* at para 37.
[63] *Ibid* at para 35.
[64] *Ibid* at para 34.

evidence rises to the level of showing a fundamental change in circumstances. Courts must be attuned to context and circumstances to assess whether the change rises to the requisite level.

Vertical stare decisis and the Charter

As a further point, we note that the Supreme Court has generally not set out a distinct approach to *stare decisis* for constitutional decisions.[65] However, there are different considerations at play for *stare decisis* under the *Charter* as compared to the interpretation of legislation or the common law.

Peter Hogg writes: "it is arguable that in constitutional cases the Court should be more willing to overrule prior decisions than in other kinds of cases."[66] One argument is that for non-constitutional cases, legislators can change the law if they reject the judicial solution, whereas in constitutional cases, a court decision can be changed only by constitutional amendment.[67] A further argument is that the principle of constitutional supremacy, enshrined in section 52 of the *Constitution Act*, *1867* (UK),[68] suggests that a court's constitutional interpretation should supersede answers provided in precedent decisions. A third argument is that *stare decisis* should apply more flexibly in constitutional cases because section 1 of the *Charter* asks courts to inquire into legislative and social facts to determine the purpose and background of the legislation. Because of the centrality of legislative and social facts to a section 1 analysis, such analysis remains binding only to the extent that a similar factual matrix continues to exist.[69] Some thus argue that *stare decisis* should operate in a manner akin to the horizontal rather than vertical convention in *Charter* cases,

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[65] Hogg, *supra* note 45, ch 8.7, nn 135–36a-b (until *Bedford*, the SCC had not expressly recognized that constitutional precedents are different from other precedents. However, the SCC had changed constitutional doctrine and "explicitly overruled a disproportionate number of constitutional precedents." Hogg refers to section 15 of the *Charter* as the most dramatic example of frequent changes in doctrine).
[66] *Ibid*, ch 8.7, n 133.
[67] *Ibid*, ch 8.7.
[68] *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5, s 52.
[69] Arvay, Tucker & Latimer, *supra* note 9 at 82 (this is relevant only where it is the section 1 analysis that is the matter at issue).

that is, an earlier decision would not be treated as strictly binding, but would be followed unless there is a compelling reason to overrule.[70]

The argument on the other side is that stability in the law is just as important in the constitutional realm. Legislative and executive action often relies on prior constitutional decisions and the other branches of government look to court decisions to guide government policy. [71] Moreover, "frequent departures from past decisions would be inconsistent with the image of a permanence implicit in a constitution."[72]

While recently, the Supreme Court has taken a somewhat more flexible approach to vertical *stare decisis* in *Charter* cases, in Canada, there is not a different doctrine of *stare decisis* in constitutional cases.[73] We turn now to the horizontal convention.

c. Horizontal convention: Overruling precedent from the same court

In Canada, the concept of *stare decisis* applies to previous decisions of the same court under the horizontal convention, even though binding precedent is limited to the vertical convention. The general rule of horizontal *stare decisis* is that decisions of the same court should be followed unless there is compelling reason not to; if there is a compelling reason, the precedent can be distinguished or departed from. However, the general rule varies in its application, and the rationale for the rule differs somewhat depending on the level of court. We first look to trial courts, then appellate courts, and finally the apex court, the Supreme Court of Canada, to explain how the horizontal convention applies at each level of court.

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[70] *Ibid* at 75.
[71] Richard Haigh, "A Kindler, Gentler Supreme Court? The Case of *Burns* and the Need for a Principled Approach to Overruling" (2001) 14:1 SCLR (2d) 139 at 143, online: *Osgoode Digital Commons* <digitalcommons.osgoode.yorku.ca/sclr/vol14/iss1/9>.
[72] Sharpe, *supra* note 5 at 165.
[73] Hogg, *supra* note 45, ch 8.7, nn 135–36 (in contrast, the Supreme Court of the United States takes a more relaxed approach to *stare decisis* in constitutional law than with most non-constitutional matters. The High Court of Australia has also occasionally refused to follow its own precedent); see also Duxbury, *supra* note 4 at 150.

i. Trial courts

Trial court judges ordinarily follow decisions of other judges from the same court, absent compelling reasons to the contrary. The law accepts that in certain circumstances a decision from a judge of the same court need not be followed.[74]

In what has become a classic statement, Justice Wilson of the Supreme Court of British Columbia stated in *Re Hansard Spruce Mills Ltd*:[75]

> I have no power to override a brother judge. I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight.[76]

The rationale for *stare decisis* in trial courts stated in *Re Hansard Spruce Mills* is "judicial comity" as well as concern about certainty and protecting parties' reliance interest.[77]

Generally, there are three exceptions as to when a judge need not follow a decision of a judge in the same court. First, the authority of the prior decision has been undermined by subsequent decisions. This may arise in the relatively straightforward case of a decision that has been overruled by, or is necessarily inconsistent with, a decision by a higher court.[78]

Second, where the decision was reached without considering a relevant

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[74] Sharpe, *supra* note 5 at 152.
[75] *Re Hansard*, *supra* note 12.
[76] *Ibid* at 592.
[77] Scott Kerwin, "Stare Decisis in the BC Supreme Court: Revisiting Hansard Spruce Mills" (2004) 62:4 Advocate 541 at 542.
[78] *Ibid* at 547 (the desirability of consistent interpretations of a federal statute across provinces suggests that a decision from a court in another province can also influence interpretation); see e.g. *R v Mason*, [1971] 3 WWR 112, 3 CCC (2d) 76 at 79 (BC SC) (Justice McIntyre found that he was not bound by a prior BC Supreme Court decision regarding the federal *Juvenile Delinquents Act*, RSC 1952, c 160, based on a contrary decision by a Manitoba Court); see also *Re Yewdale* (1995), 121 DLR (4th) 521, [1995] 4 WWR 458 at paras 28–31 (BC SC) (Justice Tysoe found that a subsequent decision of the Saskatchewan Court of Appeal meant that he was not bound by a previous BC Supreme Court decision, as the statute ought to be applied consistently across provinces).

statute or binding authority. In other words, the decision was made *per incuriam*, Latin for through carelessness or inadvertence.[79] The standard to find a decision *per incuriam* is that the court failed to consider some binding authority or relevant statute, and—had the court considered the authority or statute—it would have come to a different decision. It cannot merely be the case that an authority was not mentioned in the reasons; it must be shown that the missing authority affected the judgment.[80]

Third, "where the exigencies of the trial require an immediate decision without opportunity to fully consult authority" and thus the decision was not fully considered.[81] An unconsidered judgment is not binding on other judges. It is said that trial judges know such a decision when they see one.

There is good reason why a trial judge may depart from a prior decision by a judge of the same court: a trial judges' primary task is to decide the case on the facts before them. Following the principle of *stare decisis*, a trial judge has room to distinguish the facts or find an appropriate reason not to follow the prior decision.[82]

ii. Intermediate appellate courts

Like trial courts, intermediate appellate courts will not ordinarily depart from their own decisions. They have a duty to provide general guidance on the law, and so must be concerned with the integrity of the legal system.[83] The rationales for *stare decisis* at the intermediate appellate court level stated by Justice Laskin in *David Polowin Real Estate Ltd. v The Dominion of Canada General Insurance Co.*[84] are "consistency, certainty, predictability and sound judicial administration. … Adherence to precedent … enhances the legitimacy and acceptability of judge-made law, and by so doing enhances the appearance of

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[79] James Arthur Ballentine, ed, *Ballentine's Law Dictionary*, 3rd ed, (Rochester, NY: Lawyers Co-operative Pub Co) sub verbo "*per incuriam*".
[80] Kerwin, *supra* note 77 at 551.
[81] *Re Hansard*, *supra* note 12 at 592.
[82] Kerwin, *supra* note 77 at 553.
[83] Sharpe, *supra* note 5 at 155–56.
[84] *Polowin*, *supra* note 6.

justice."[85] While the apex court plays a larger role in the development of the law, intermediate courts of appeal administer more decisions, and so it is important that they follow *stare decisis* to maintain the stability of the legal system.

The traditional rule is that there are narrow exceptions to *stare decisis* for intermediate appellate courts. In *Young v Bristol Aeroplane Co Ltd*,[86] Lord Greene of the English Court of Appeal identified three. First, where a court is faced with conflicting decisions from the same court it can decide which decision to follow. Second, a court is not bound to follow a prior decision that is inconsistent with a decision of the House of Lords. Finally, a court is not bound to follow a prior decision that is *per incuriam* or made in disregard of a binding statute, rule, or other legal authority. This latter category *could* be construed broadly—it can always be argued that a decision did not consider every statute, rule, or earlier binding decision—but were this exception interpreted widely, it would swallow the rule.[87] It has also been argued that an appellate court is not bound to follow a prior decision that was based on a "manifest slip or error".[88] However, this exception is not often relied on, perhaps because such obvious errors are rare.

For many litigants, the intermediate appellate court is "effectively the court of last resort."[89] Different appellate courts have their own formulations as to when to depart from horizontal *stare decisis*. For example, the Manitoba Court of Appeal in *R v Neves*[90] stated that a court will be more prepared to overrule a purely conclusory decision than a fully reasoned one: "The court's freedom to depart from a prior, incorrect decision should logically increase in direct proportion to the extent that the prior decision lacks a fully reasoned, analytically sound foundation."[91] Another example is the Court of Appeal for Ontario's list of seven factors that justified departing from precedent in *David*

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[85] *Ibid* at paras 119–20.
[86] *Young v Bristol Aeroplane Co Ltd*, [1944] KB 718 at 725, [1944] 2 All ER 293 (CA).
[87] Sharpe, *supra* note 5 at 156.
[88] *Ibid* at 157, citing *Morelle Ltd v Wakeling*, [1955] EWCA Civ 1, [1955] 1 All ER 708 (CA); see also *R v Neves*, 2005 MBCA 112 at para 106 [*Neves*].
[89] *R v Beaudry*, 2000 ABCA 243 at para 20 [*Beaudry*].
[90] *Neves*, *supra* note 88.
[91] *Ibid* at para 106; see also *Beaudry*, *supra* note 89 at paras 29–30.

Polowin Real Estate Ltd. v Dominion of Canada General Insurance Co.,[92]: i) whether the decision was attenuated by later decisions of the court; ii) whether the decision raises a recurring question; iii) whether parties are relying on the decision; iv) whether the decision is relatively recent (it is preferable to "correct an error early on than to let it settle in"); v) whether the factual record now provides better context for the decision, vi) the amount of money at stake in the litigation, and vii) whether the SCC is likely to correct the error.[93] In *Polowin*, the Court of Appeal, sitting as a five-judge panel, faced the question of whether to overrule an earlier decision.

The practice for overruling: five-judge panels

The practice in many Canadian appellate courts is to strike a panel of five judges or more, rather than the usual three, when the court is considering overruling its previous decision. In such cases, the court can depart from *stare decisis* when none of the exceptions apply. In Ontario, for example, a court of appeal sitting as five may revisit its own precedent, resolve inconsistencies between decisions by different panels, and address a reference by a provincial Cabinet.[94] Most intermediate appellate courts can sit as five, but there are at least two exceptions—the Prince Edward Island Court of Appeal, which has only three judges, and the Court Martial Appeal Court of Canada, which explained that because it cannot sit as five, it adopts a strict approach to *stare decisis*.[95]

iii. Supreme Court of Canada

Finally, the Supreme Court of Canada, as an apex court, takes a different approach to horizontal *stare decisis.*

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[92] *Polowin*, *supra* note 6.
[93] *Ibid* at paras 137–43.
[94] "Practice Direction Concerning Civil Appeals and the Court of Appeal for Ontario" (1 March 2017), online: *Court of Appeal for Ontario* <www.ontariocourts.ca/coa/en/notices/pd/civil.htm>.
[95] See *R v Déry*, 2017 CMAC 2 at para 95. The *National Defence Act,* RSC, 1985, c N-5, s 235(2), provides that "[e]very appeal shall be heard by three judges of the Court Martial Appeal Court sitting together…".

The Supreme Court's role has changed over time. At its inception, the Supreme Court was not a court of last resort; that was the Judicial Committee of the Privy Council ("JCPC"). In 1949, appeals to the JCPC were abolished, and thereafter, the Supreme Court developed a distinct body of jurisprudence.[96] Since the 1950s, the Supreme Court has accepted the possibility of overruling its own decisions.[97] The principle of *stare decisis* was first expressly formulated by the Supreme Court in *Stuart v Bank of Montreal*.[98] While the Court remained answerable to the Privy Council, the Supreme Court stated that it should not disregard its previous decisions apart from "very exceptional cases."[99] Beginning in the late 1970s and early 1980s, the Supreme Court demonstrated a willingness to overturn precedents of its own as well as JCPC precedents where there were "compelling reasons."[100]

Today, the Supreme Court exercises a law-making function, which influences its approach to *stare decisis.* The Court hears cases for which it grants leave, save for two exceptions. Those exceptions are: (1) "as of right" cases for which leave is not required, and (2) advisory opinions on questions referred to the Court by the Governor in Council. Otherwise, the Court controls its own docket.[101] The Court gained control over its docket in 1975, and the Court's main function became, as then Chief Justice Bora Laskin wrote in the

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[96] John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002); L'Heureux-Dubé, *supra* note 4 at 4; see also *R v Bernard*, [1988] 2 SCR 833, [1988] SCJ No 96 (QL) [*Bernard*] and *R v Salituro*, [1991] 3 SCR 654 at 655–56, [1991] SCJ No 9 (QL) [*Salituro*].

[97] *Reference Re Farm Products Marketing Act*, [1957] SCR 198 at 212, 208 DLR (4th) 494; *Minister of Indian Affairs and Northern Development v Ranville*, [1982] 2 SCR 518 at 527, 139 DLR (3d) 1 [*Ranville*]; see also *Salituro*, *supra* note 96 at 655–56.

[98] (1909) 41 SCR 516, 1909 CanLII 3 [*Stuart* cited to SCR].

[99] *Ibid* at 549; see Andrew Joanes, "Stare Decisis in the Supreme Court of Canada" (1958) 36:2 Can Bar Rev 175 at 180–81; *Capital Cities Communications Inc v Canadian Radio-Television & Telecommunications Commission* (1977), [1978] 2 SCR 141, 81 DLR (3d) 609 (the rule set forth in *Stuart*, *supra* note 98, was qualified in this case, stating "this Court is not bound by judgments of the Privy Council any more than it is bound by its own judgments" at 161).

[100] *Binus v R*, [1967] SCR 594 at 601, [1968] 1 CCC 227; *Ranville*, *supra* note 97 at 527.

[101] As of right cases include certain criminal cases and appeals from opinions pronounced by courts of appeal on matters referred to them by a provincial government, see *Supreme Court Act*, RSC, 1985, c S-26 ss 43, 53.

Canadian Bar Review, "to oversee the development of the law" and "to give guidance in articulate reasons … on issues of national concern."[102] Control over its docket, combined with the introduction of the *Charter*, gave courts a greater law-making function and required the Supreme Court to re-examine earlier decisions in light of the rights and freedoms enshrined in the *Charter*.[103]

The Supreme Court has addressed when it will overturn its own precedents. Justice Dickson set out a non-exhaustive list of instances in which the court was willing to overturn its own precedent, dissenting in *R v Bernard*,[104] later adopted by the full Court.[105]

First on the list is where the decision is inconsistent with or fails to reflect the values of the *Charter*. This was of particular concern as cases were being heard upon the enactment of the *Charter*. The *Charter* fundamentally changed the legal landscape, and decisions by courts had to reflect this change. This accords with the view of courts as guardians of the constitution, charged with ensuring, under section 52 of the *Constitution Act, 1982*, that any laws inconsistent with the Constitution are declared to be of no force and effect to the extent of the inconsistency.[106] As the Supreme Court of Canada stated in *Bedford*, "the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional."[107]

The next three instances where the Supreme Court will overturn its own decision are based on rationales relating to certainty and changing circumstances. One, where a decision has been subsequently "attenuated."[108] As Justice Sharpe writes, "[a] court should confront a decision that has not stood up to the test of time."[109] Another is where the social, political or economic

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[102] Sharpe, *supra* note 5 at 164, citing Bora Laskin, "The Role and Function of Final Appellate Courts: The Supreme Court of Canada" (1975) 53:3 Can Bar Rev 469 at 475.
[103] *Ibid* at 164.
[104] *Bernard*, *supra* note 96.
[105] Sharpe, *supra* note 5 at 161, citing *R v Chaulk*, [1990] 3 SCR 1303, [1990] SCJ No 139 (QL); *R v B (KG)*, [1993] 1 SCR 740, [1993] SCJ No 22 (QL).
[106] s 52(1), being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[107] *Bedford*, *supra* note 50 at paras 43–44.
[108] *Polowin*, *supra* note 6 at paras 124, 128, 131.
[109] Sharpe, *supra* note 5 at 161.

assumptions underlying a decision are no longer valid in contemporary society. Justice Sharpe comments that "[t]his has become a significant factor in *Charter* litigation where parties are able to present a comprehensive factual record to demonstrate that the actual operation and effect of a law is other than what was found or assumed by the court when it made a prior determination of constitutional validity."[110] The next is where a decision fails to articulate a workable rule or standard having content sufficient to guide behavior. This is similar to the second instance, as it is concerned with providing certainty. Where adhering to a decision produces uncertainty, "it is better, in the name of predictability, to overrule it."[111] A similar point was made by the dissent in *Teva v Canada*[112]: "Generally, adhering to precedent enshrines certainty. However, in some instances continued recognition of prior decisions has the effect of *creating* uncertainty … and therefore following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law."[113]

Finally, the fifth instance is particular to criminal law: a court will not ordinarily overrule a prior decision where the effect would be to expand the reach of criminal liability or restrict the liberty of the subject. In *R v Henry*, the Supreme Court overruled a 19-year-old precedent on the right against self-incrimination, noting the need to be "particularly careful before reversing a precedent where the effect is to diminish *Charter* protection."[114] Heightened attention is needed where overturning precedent would adversely impact the accused. There is a problem where a court finds conduct previously thought lawful to be criminal. In contrast, the court will feel less constrained in overturning a prior decision that restricted the liberty of the accused.[115]

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[110] *Ibid* at 161–62.
[111] *Ibid* at 162.
[112] *Teva Canada Ltd v TD Canada Trust*, 2017 SCC 51 at para 141.
[113] *Ibid*, Côté & Rowe JJ, dissenting (McLachlin CJC & Wagner J concurring) (while this statement was contained in dissenting reasons, it was in the application of the statement where the majority and minority differed).
[114] *Henry*, *supra* note 28 at para 44.
[115] Sharpe, *supra* note 5 at 162, citing *R v Santeramo* (1976), 32 CCC (2d) 35, [1976] OJ No 987 (QL) (CA), Brooke JA ("I do not feel bound by a judgment of this Court where the liberty of the subject is in issue if I am convinced that the judgment is wrong" at 46. This statement was cited with approval in *Bernard*, *supra* note 96 at para 55).

The decision by former Chief Justice Dickson in the early days of the *Charter*, in 1988, reflects his view of how the Supreme Court would apply the doctrine of *stare decisis* given the introduction of the *Charter.* Chief Justice Dickson acknowledged that the Court would have a greater role to play in assessing the constitutionality of laws, and located the central concern of *stare decisis* in certainty and maintaining a principled line of decisions. Speaking at the turn of the 21st century, Chief Justice McLachlin reflected on the more flexible approach to *stare decisis* and the expanded role of the Court:

> Resolving disputes is still the primary and most fundamental task of the judiciary. But for some time now, it has been recognized that the matter is not so simple. In the course of resolving disputes, common law judges interpreted and inevitably, incrementally, with the aid of the doctrine of precedent or *stare decisis*, changed the law. The common law thus came to recognize that while dispute resolution was the primary task of the judge, the judge played a secondary role of lawmaker, or at least, law-developer. In the latter part of the twentieth century, the lawmaking role of the judge has dramatically expanded. Judicial lawmaking is no longer always confined to small, incremental changes. Increasingly, it is invading the domain of social policy, once perceived as the exclusive right of Parliament and the legislatures.[116]

Both perspectives from these former Chief Justices reflect concern with maintaining stability in the law, while acknowledging that the court may have to depart from prior decisions to ensure the law remains principled and relevant. Sitting on the Supreme Court of Canada provides a distinct institutional vantage point on the legal system. While the role of courts, and certainly the Supreme Court of Canada, has evolved since 1949, courts generally keep to the sort of "incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."[117] It is this balancing that judges undertake based on the doctrine of *stare decisis*.

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[116] Rt Hon Beverley McLachlin, "The Role of Judges in Modern Society" (Speech delivered at The Fourth Worldwide Common Law Judiciary Conference, Vancouver, BC, 5 May 2001).
[117] *Salituro*, *supra* note 96 at 670.

Step 3: What does it means to follow precedent?

What does it mean to apply a precedent? A sound judicial decision will do more than trace a line of cases and replicate the reasoning. Judicial decision-making calls for a judge to look to a number of prior decisions to understand how a principle applies. [118] A judge must often look to more than one line of cases and think across a range of decisions. [119] A judge should be guided by precedent, even when faced with what looks like an entirely new situation, rather than "striking out unpredictability with a new approach of their own."[120]

A thoughtful application of the doctrine of *stare decisis* calls for a judge to reflect on the reasoning in relevant precedent and identify the *ratio*. A judge must consider *how* to apply the *ratio* to the factual matrix before them. Judges will then attempt to articulate a clear line of reasoning, consistent with precedent, in deciding the case. Such concern for consistency in the law reflects, as Lord Mansfield put it, that the law exists not only in a "particular case; but in general principles, which run through the cases, and govern the decisions of them."[121]

IV. CONCLUSION

Roscoe Pound characterizes *stare decisis* as a tool well suited to the common law. *Stare decisis* is "based on a conception of law as experience developed by reason and reason tested and developed by experience."[122] The principles of *stare decisis* inform judicial decision-making by creating a productive tension between maintaining certainty and achieving a just result. Professor Neil Duxbury stated it well: "[t]he value of the doctrine of precedent rests not in its capacity to commit decision-makers to a course of action but in its capacity

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[118] Roscoe Pound, "What of Stare Decisis?" (1941) 10:1 Fordham L Rev 1 at 7.
[119] Duxbury, *supra* note 4 at 61, n 14, citing Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Belknap Press, 2006) at 79, 123–24 ("coherence, not simply with particular doctrines here and there, but, as best as it can be achieved, principled coherence with the whole structure of the law" at 250).
[120] Waldron, *supra* note 10 at 9.
[121] Duxbury, *supra* note 4 at 51, citing *Rust*, *supra* note 19, Lord Mansfield.
[122] Pound, *supra* note 118 at 5.

simultaneously to create constraint and allow a degree of discretion."[123] As a practical matter, it may not always be clear when *stare decisis* principles call for following a precedent or allowing judicial development of the law to reach a new result. But it is in navigating this productive tension with good judgment that one strives to reach a just result within a coherent and (relatively) certain system of laws.

[123] Duxbury, *supra* note 4 at 183.