Citation: Canadian Broadcasting Corporation et al v Morrison, 2017 MBCA 36

Date: 20170407
Docket: AR15-30-08508

# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Mr. Justice Michel A. Monnin
Madam Justice Freda M. Steel
Mr. Justice Christopher J. Mainella

***B E T W E E N :***

| | | |
|---|---|---|
| | ) | ***R. L. Tapper, Q.C.*** *and* |
| | ) | ***C. C. Wullum*** |
| | ) | *for the Appellant Canadian* |
| | ) | *Broadcasting Corporation* |
| ***CANADIAN BROADCASTING*** | ) | |
| ***CORPORATION, MORRIS KARP,*** | ) | ***J. R. Wolson, Q.C.*** |
| ***BOB McKEOWN and TIMOTHY SAWA*** | ) | *for the Appellants* |
| | ) | *Morris Karp, Bob McKeown* |
| *(Applicants) Appellants* | ) | *and Timothy Sawa* |
| | ) | |
| *- and -* | ) | ***J. C. Prober*** *and* |
| | ) | ***B. T. King*** |
| ***ALICK MORRISON*** | ) | *for the Respondent* |
| | ) | |
| *(Respondent) Respondent* | ) | *Appeal heard:* |
| | ) | ***September 26, 2016*** |
| | ) | |
| | ) | *Judgment delivered:* |
| | ) | ***April 7, 2017*** |

On appeal from 2015 MBQB 130

## MAINELLA JA

### Introduction

[1] This appeal raises two issues. First, can a television broadcast be an act of publication of a defamatory libel? Second, is it a jurisdictional

error if hearsay evidence is admitted and relied on at a pre-enquete hearing (also known as a process hearing or pre-inquiry hearing) under section 507.1 of the *Criminal Code* (the *Code*) to decide whether process should issue for a private prosecution? The relevant provisions of the *Code* for this appeal are attached as Appendix A to these reasons.

[2] The applicants face a private prosecution for one count of publishing a defamatory libel (section 301 of the *Code*) and one count of publishing a defamatory libel known to be false (section 300 of the *Code*). The charges arise from an episode of the investigative journalism program "the fifth estate" that was broadcast nationally on the television network of the Canadian Broadcasting Corporation (CBC), and later made available over the Internet from the CBC's website. The episode, entitled "Larger than Life," was about Peter Nygård (Nygård), a well-known international businessman in the fashion industry. The central theme of the episode was that Nygård's carefully crafted image may be a distortion of reality based on allegations of him frequently mistreating his staff and engaging in sexually inappropriate behaviour with his staff and others.

[3] A Provincial Court judge (the PCJ) conducted a pre-enquete hearing and decided to issue summonses against each of the applicants for them to attend court to answer to both charges.

[4] The applicants moved for a writ of *certiorari* to quash the PCJ's decision and the summonses that were issued. The reviewing judge dismissed the request for *certiorari*, finding that the PCJ had not made a jurisdictional error.

[5] The arguments of the applicants in favour of a jurisdictional error

having been made are essentially twofold. First, they argue that proof of the *actus reus* of the offences charged requires that there be a physical act of publishing a defamatory libel (see *R v Lucas*, [1998] 1 SCR 439 at para 30). They say that there was no evidence presented at the pre-enquete hearing that any of them published a defamatory libel. They submit that historically "libel" has been understood to be the publishing of a defamatory matter in a permanent visible form, typically printed or written words, while a defamatory matter communicated by spoken words, or some other transitory method, is referred to as "slander". While the distinction between libel and slander has been abolished for civil actions in Manitoba (see definition of "defamation" in section 1 of *The Defamation Act*, CCSM c D20), the applicants say that the distinction is still relevant for a criminal proceeding because, in their view, a television broadcast typically contains oral, as opposed to written, statements.

[6] The second argument of the applicants is that the PCJ exceeded his jurisdiction in issuing process for the private prosecution. The applicants submit that a judge or designated justice conducting a pre-enquete hearing has a mandatory duty under section 507.1(3)(a) of the *Code* to hear and consider the allegations of the informant "and the evidence of witnesses" [emphasis added] before he or she may exercise his or her discretion to issue process under section 507.1(2) of the *Code* (see *R v McHale*, 2010 ONCA 361 at para 69, leave to appeal to SCC refused, [2010] SCCA No 290 (*McHale #1*)). The applicants argue that did not occur in their case because the PCJ based his decision to issue process against them not on the evidence of witnesses, but on hearsay evidence.

[7] For the following reasons, I would dismiss the appeal.

Background Facts

[8] The factual background is comprehensively set out in the reviewing judge's reasons and needs not be repeated. The essential facts are as follows.

[9] The charges against the applicants read as follows:

> (1) the Canadian Broadcasting Corporation, also known as CBC, Timothy Sawa, Morris Karp and Bob McKeown on or about April 9, 10, 11, 12[,] 13, and 16, 2010 at the City of Winnipeg, in the Province of Manitoba, did publish a defamatory libel by broadcasting and rebroadcasting the Fifth Estate program entitled "Larger than Life" about Peter John Nygard on its network and on its website contrary to Section 301 of the Criminal Code of Canada.
>
> (2) the Canadian Broadcasting Corporation, also known as CBC, Timothy Sawa, Morris Karp and Bob McKeown on or about April 9, 10, 11, 12[,] 13, and 16, 2010 at the City of Winnipeg, in the Province of Manitoba, did publish a defamatory libel knowing that it was false by broadcasting and rebroadcasting the Fifth Estate program entitled "Larger than Life" about Peter John Nygard on its network and on its website contrary to Section 300 of the Criminal Code of Canada.

[10] In addition to the private prosecution, Nygård and his business have filed a civil claim for defamation in Manitoba against the applicants, as well as David Studer, the executive producer of "the fifth estate".

[11] The episode was first broadcast on April 9, 2010. It was re-broadcast on several occasions in April 2010 and was later made available for viewing at any time over the Internet from the CBC's website. The individual applicants performed the following roles in the episode:

Timothy Sawa—producer/director; Morris Karp—co-producer; and Bob McKeown—writer/reporter/host.

[12] Lawyers for Nygård and the CBC had a lengthy dialogue in written correspondence prior to April 9, 2010, as to whether Nygård's reputation may be damaged by alleged false statements to be made in the episode. The CBC alerted Nygård to several allegations that they were making inquiries about and requested his comments on them. Two of the allegations are noteworthy. The first was whether Nygård frequently mistreated his staff with verbal abuse and unfair labour practices. This allegation rested largely on the CBC's interview of former Nygård employees. A second allegation, also based on interviews of former Nygård employees, was of Nygård engaging in inappropriate sexual behaviour with unnamed women generally and specifically with a named woman, (M.R.), who was from the Dominican Republic and was alleged to be under age 18, during her stay at Nygård's Bahamian residence in July 2003.

[13] Nygård's lawyers vehemently denied all of the allegations. They provided the CBC with various documents and witness statements to cast doubt on the credibility of the former employees of Nygård interviewed by the CBC, as well as a statement from M.R. where she stated, in essence, that she represented being the age of 18 at the time of her 2003 visit to Nygård's Bahamian residence and, during her visit there, she was not subjected to any inappropriate behaviour by Nygård or anyone else.

[14] In July 2010, lawyers for Nygård retained the respondent, Alick Morrison (Morrison), a decorated retired Detective Inspector from the Metropolitan Police, New Scotland Yard, London, England to investigate

which individuals may be attempting to damage the reputation of Nygård. Morrison's mandate included finding out who was responsible for tracing and selecting participants who appeared in the episode. Morrison's ultimate conclusion was that the CBC's creation of the episode was simply the latest event in the ongoing and well-documented conflict between Nygård and his neighbour in the Bahamas, the American hedge-fund billionaire, Louis Bacon (Bacon).

[15] The pre-enquete hearing for the private prosecution took place on May 28-29, 2012. The PCJ gave his decision on April 29, 2013. Counsel for the Attorney General of Manitoba was present at the hearing and participated in it. Morrison testified at the pre-enquete hearing and the following exhibits were tendered:

> **Exhibit #1** – a DVD of the episode and a written transcript of it;
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> **Exhibit #2** – a binder with copies of correspondence between lawyers for the CBC and Nygård over the period of March 30, 2009 to April 9, 2010;
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> **Exhibit #3** – a copy of an affidavit of Morrison filed in the Supreme Court of the Commonwealth of the Bahamas on March 25, 2011, in a lawsuit between Nygård, Bacon and others, detailing his inquiries on behalf of Nygård; and
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> **Exhibit #4** – a copy of the Manitoba civil statement of claim for defamation.

[16] Crown counsel advised the PCJ, at the conclusion of the calling of evidence, that the position of the Attorney General was that, in light of the

Crown's private prosecution policy (which has two criteria—whether there is a reasonable likelihood of conviction and is there a public interest in proceeding (see Manitoba, Department of Justice, Prosecutions, Private Prosecutions *Guideline No 5:PRI:1*, online: <www.gov.mb.ca/justice/prosecutions/pubs/private_prosecutions.pdf>)), the Crown had decided to "not do anything at this point in time". Crown counsel advised the PCJ that it would allow Morrison to seek the issue of process under section 507.1(2) of the *Code* without the Crown's intervention but would make no submission as to whether process should issue on the evidence presented.

[17] In his reasons, the PCJ was alive to the fact that one of the two defamatory libel offences charged, publishing defamatory libel contrary to section 301 of the *Code*, has been declared to be unconstitutional outside of Manitoba (see *R v Lucas* (1995), 129 SaskR 53 (QB); *R v Byron Prior*, 2008 NLTD 80; *R v Finnegan*, [1992] AJ No 1208 (QB); and *R v Gill* (1996), 29 OR (3d) 250 (Gen Div)). He determined, however, that was not a "consideration" he could take into account in deciding whether to issue process.

[18] When the appeal was heard, counsel for Morrison was asked whether he and Crown counsel had discussed the constitutionality of section 301 of the *Code* in light of the *Lucas* decision from the Supreme Court of Canada, whether the Attorney General had determined it was appropriate to allow a prosecution of that offence to proceed in light of it being constitutionally suspect and whether the Attorney General would defend the constitutionality of that offence if a trial of the applicants ever occurred. Counsel for Morrison advised the Court that he and Crown

counsel had never discussed these issues but he undertook to do so.

*Certiorari* Proceedings for a Pre-Enquete Hearing and the Standard of Review for a *Certiorari* Appeal

[19] *Certiorari* is a discretionary extraordinary remedy of a superior court. In criminal proceedings, it takes two forms. Rothstein J explained in *R v Cunningham*, 2010 SCC 10, that a writ of *certiorari* is available "where the inferior court has made a jurisdictional error or an error of law on the face of the record" (at para 57). The question of the scope of a *certiorari* review in a given case turns on the nature of the proceeding, the status in the criminal proceeding of the moving party, the finality of the order being challenged and whether the affected party otherwise has a right to have the alleged error reviewed in the criminal process (see *Dubois v The Queen*, [1986] 1 SCR 366 at 370, 373-74; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 864-65; *R v Primeau*, [1995] 2 SCR 60 at paras 11-13; and *R v Jobin*, [1995] 2 SCR 78 at paras 27-28).

[20] The parties here agree, as do I, that a *certiorari* review of a decision to issue process in a private prosecution pursuant to section 507.1(2) of the *Code* is limited to jurisdictional error (see *R v Vasarhelyi*, 2011 ONCA 397 at para 50). Absent demonstration of a jurisdictional error, the reviewing court has no ability to interfere with the impugned decision (see *R v Sazant*, 2004 SCC 77 at para 14). McLachlin CJC explained the limited nature of a *certiorari* review for jurisdictional error in the following way in *R v Russell*, 2001 SCC 53 (at para 19):

> The scope of review on *certiorari* is very limited. While at certain times in its history the writ of *certiorari* afforded more extensive review, today *certiorari* "runs largely to jurisdictional

> review or surveillance by a superior court of statutory tribunals, the term 'jurisdiction' being given its narrow or technical sense": *Skogman v. The Queen*, [1984] 2 S.C.R. 93, at p. 99. Thus, review on *certiorari* does not permit a reviewing court to overturn a decision of the statutory tribunal merely because that tribunal committed an error of law or reached a conclusion different from that which the reviewing court would have reached. Rather *certiorari* permits review "only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction or has acted in breach of the principles of natural justice which, by the authorities, is taken to be an excess of jurisdiction": *Skogman*, *supra*, at p. 100 (citing *Forsythe v. The Queen*, [1980] 2 S.C.R. 268).

[21] A pre-enquete hearing is a procedure governed entirely by statute. It is a non-adversarial process that is *ex parte* and *in camera*. An accused has no right to be present, even if aware of the proceeding. The key concerns for the Court are whether the "information is valid on its face" and, if so, whether the evidence presented "discloses a *prima facie* case of the offences alleged" (*R v Grinshpun*, 2004 BCCA 579 at para 32, leave to appeal to SCC refused, [2004] SCCA No 579). The Court does not consider the likelihood of conviction or potential defences (see also *R v Whitmore* (1987), 41 CCC (3d) 555 at 565, 568, 571 (Ont H Ct J), aff'd (1989), 35 OAC 373; *Southam Inc et al v Coulter J et al* (1990), 40 OAC 341 at para 23; and *Vasarhelyi* at para 49). Watt JA summarized the nature of the pre-enquete hearing, in the situation of a private prosecution, this way in *McHale #1* (at para 74):

> Conduct of the pre-enquete vindicates the interest of the private informant who seeks prosecution of another for an alleged crime. The pre-enquete assures the private informant that an independent judicial officer will hear the informant's allegations, listen to the evidence of the informant's witnesses, and decide whether there this is evidence of each essential element of the

> offence charged in the information. The pre-enquete also ensures that spurious allegations, vexatious claims, and frivolous complaints barren of evidentiary support or legal validity will not carry forward into a prosecution.

[22] However, even where the information is valid on its face and the evidence discloses a prima facie case of the offence(s) alleged, the Court does have a limited discretion to decline to issue process on a private prosecution in the "clearest of cases" (*R v Parkinson*, 2009 CanLII 729 at para 27 (Ont Sup Ct J)). Garton J explained this limited discretion as follows in *R v Halik*, 2010 ONSC 125 (at para 20): "the justice has a discretion not to issue process where he or she forms the opinion that the informant or his witnesses are not credible in the sense that they are mentally disordered or the charge is frivolous, vexatious or abusive". See also *R v Edge*, 2004 ABPC 55 at paras 70-73.

[23] Following up on Watt JA's comments in *McHale #1*, the screening function of the pre-enquete hearing for a private prosecution is not entirely the responsibility of the judiciary. When Parliament modernized the criminal procedure regarding private prosecutions (see *Criminal Law Amendment Act, 2001*, SC 2002, c 13), its intent was, as McWatt J noted in *Friesen v Ontario* (2008), 229 CCC (3d) 97 (Ont Sup Ct J), for there to be "greater scrutiny" (at para 9) of private prosecutions at an early stage to weed out unmeritorious cases. As part of the reform, Parliament ensured that the Attorney General would play a prominent and independent role in the process. The Attorney General must be given reasonable notice of the pre-enquete hearing, a copy of the information and the opportunity to fully participate in the proceeding (see sections 507.1(3)(b)-(d) of the *Code*).

[24] As the chief law officer of the Crown, the Attorney General has the ultimate responsibility to supervise all prosecutions, including private prosecutions (see *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 42-47). The supervising function includes the power to intervene and assume conduct of the private prosecution (see *Krieger* at para 46); the power to intervene in the private prosecution, with the rights of a party, but without conducting the private prosecution (see section 579.01 of the *Code*); or the power to direct a stay of proceedings at any time after an information is laid to terminate the private prosecution, even before the commencement or completion of the pre-enquete hearing (see section 579(1) of the *Code*; *R v Pardo* (1990), 62 CCC (3d) 371 at 373-74 (Que CA); and *McHale #1* at para 89).

[25] The responsibility of the Attorney General to supervise a private prosecution does not end with the decision to issue process under section 507.1(2) of the *Code*. Crown counsel here properly described the role of the Attorney General when he told the PCJ that his office "will always . . . have a role in this matter as it progresses through the system". Throughout the criminal process, the Attorney General exercises an independent decision-making role, separate and apart from the informant, the accused and the courts. Decisions in relation to a private prosecution are exercises of prosecutorial discretion and will not be second-guessed or interfered with on a judicial review absent demonstration of the very high threshold of an abuse of process (see *Krieger* at paras 31-32; *R v Anderson*, 2014 SCC 41 at paras 46-51; *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at para 49).

[26] The principles set out in *Skogman v Her Majesty The Queen*,

[1984] 2 SCR 93 for an order to stand trial after a preliminary inquiry apply equally to the decision at the pre-enquete hearing as to whether a case "is made out" for the purposes of section 507.1(2) of the *Code* (see *R v Pierce*, 2004 CanLII 10608 (Ont Sup Ct J)). A jurisdictional error occurs where process is issued for a private prosecution of an offence in the absence of some evidence on every essential element of the offence (see *Skogman* at p 106 and *Pierce* at para 7). In addition to the issuance of process in the absence of a prima facie case, a jurisdictional error can also arise at the pre-enquete hearing where the mandatory provisions of the *Code* are ignored, not followed or there is a denial of natural justice (see *Dubois* at p 377; and *Forsythe v The Queen*, [1980] 2 SCR 268 at 271-72).

[27] Where a party is unsatisfied with the superior court's decision on a *certiorari* review of the decision to issue process on a private prosecution, he or she has a right of appeal pursuant to section 784(1) of the *Code* (see *R v Douglas*, 2016 MBCA 81 at para 37). The standard of review in such an appeal was explained as follows by Chartier CJM in *R v Hyra (J)*, 2013 MBCA 59, leave to appeal to SCC refused, [2014] SCCA No 224, (at para 7):

> The standard of review to be applied to the motions judge's decision can succinctly be stated as follows: if the correct standard was selected and if it was properly applied, then great deference will be owed to the decision of the motions judge (see *R. v. Eckstein (S.M.)*, 2012 MBCA 96 at paras. 5-16, 288 Man.R. (2d) 26).

See also *R v Parker*, 2014 MBCA 75 at paras 12-18.

Issue One—Publication of Defamatory Libel by a Television Broadcast

*Introduction*

[28] The offences laid in the private prosecution in the case at bar have rarely been prosecuted since being adopted in the *Code* in 1874. Sections 300 and 301 of the *Code* are based on sections 4 and 5 of the *Libel Act, 1843* (UK), 6 & 7 Vict, c 96 (see "Defamatory Libel" (1984) Law Reform Commission of Canada (the LRCC) Working Paper No 35, online: <www.lareau-law.ca/LRCWP35.pdf>, at 5 (the report); and *R v Stevens (BG)* (1995), 100 ManR (2d) 81 at paras 46-49 (CA)). While defamatory libel offences still exist in Canada, they were abolished in 2010 in the UK (see the *Coroners and Justice Act 2009* (UK), c 25, sections 73, 178 (schedule 23)).

[29] In the report, the LRCC recommended that all defamatory libel offences be repealed from the *Code* because, in its view, such offences were outdated and defamation is better left to civil courts. While Parliament never accepted the LRCC's recommendations, the parliamentary record surrounding the *Coroners and Justice Act 2009* is clear that, for the same reasons identified by the LRCC, defamatory libel offences were repealed in the UK (see comments of Lord Lester and Lord Bach in UK, HL, *Parliamentary Debates*, vol 712, No 105, cols 843-50 (9 July 2009).

[30] Another introductory comment is that the constitutionality of the offences in this private prosecution was not before the reviewing judge or this Court, nor, given the comments of the Supreme Court of Canada in *Lucas*, is there reason on the modest record here to doubt the validity of the offence of publishing a defamatory libel known to be false contrary to

section 300 of the *Code*.

[31] The limited and narrow substantive question before this Court is whether the reviewing judge was correct in deciding that the PCJ did not commit a jurisdictional error by issuing process on the private prosecution because there was some evidence on every essential element of the offences charged. For the purposes of this appeal, subject to their hearsay submission that will be addressed later, the applicants do not contest the *mens rea* of the offences or that there was some evidence before the PCJ that the content of the episode was false and gravely defamatory of Nygård; rather, they argue that the medium used (a television broadcast) cannot support the "publication" of a "libel".

*Elements of Offence of Publishing a Defamatory Libel Known to be False*

[32] Given there is some doubt about the allegation of publishing a defamatory libel proceeding until the Attorney General's representative is consulted (see para 18), I will restrict my discussion to the other, more serious, allegation. Aside from proof of identity and jurisdiction, the elements of the offence of publishing a defamatory libel known to be false are:

*Actus Reus*

1. the meaning of the matter in question must be sufficiently grave objectively to be defamatory as defined by section 298(1) of the *Code*;

2. the form of the defamatory matter must be an expression as defined by section 298(2) of the *Code*;

3. the defamatory matter must be false (see sections 300 and 612(1) of the *Code*); and

4. the matter in question must be physically published to a third party (see section 298 of the *Code*) in one of the three ways set out in section 299 of the *Code* (without reference to the words "by the person whom it defames or" in section 299(c) of the *Code*).

*Mens Rea*

1. knowledge of the falsity of the published statements;

2. intention to publish the false statements; and

3. intention to defame the complainant.

(See *Lucas* (SCC) at paras 30, 58, 67-68, 78-82, 84-86, 99, 104; *R v ADH*, 2013 SCC 28 at para 52; *Gleaves v Deakin*, [1979] 2 All ER 497 at 502, 508-9 (HL (Eng)); *Botiuk v Toronto Free Press Publications Ltd*, [1995] 3 SCR 3 at para 62; *Grinshpun* at paras 36-37; *R v Stevens*, (1993) 82 CCC (3d) 97 at 127-28, 139 (Man Prov Ct), aff'd in *Stevens* (CA); and *Her Majesty the Queen v Hardev Kumar*, 2014 ONSC 2516 at para 9.)

*Evidence of Publication of a Defamatory Libel*

[33] A review of the transcript of the pre-enquete hearing confirms that the PCJ was keenly aware that the *Code* requires that the defamatory matter be a "libel" that was "published". He was concerned how that could occur with a television broadcast. He asked counsel for Morrison, "So can you, in fact, express a defamatory libel by virtue of a television program?" Counsel

took the position that the essential element of publication of a defamatory libel, when dealing with statements made during a television broadcast, was satisfied by the fact that a transcript of the CBC broadcast could be obtained by the public.

[34] A review of Exhibit #1 confirms that at no time during the television broadcast was there any direct information for a viewer as to how to obtain a written transcript of the episode. Viewers were, however, directed by the CBC's advertisements during the episode and by Mr. McKeown at the end of the episode to go to the CBC website for "more information" or to provide "ideas or suggestions" for future programs.

[35] According to the record, the website of the CBC includes information on content of the CBC. If the hyperlinks are activated, the user will eventually learn that a copy or transcript of a CBC news or current affairs program, such as "the fifth estate", can be purchased from Cision, a multinational communications company with offices in Canada. Contact details for Cision, including a hyperlink to their website, are provided on the CBC's website. The transcript of the episode, which is part of Exhibit #1, indicates on its face that it was prepared by Cision and sent to Nygård's business and his lawyers on April 13, 2010.

[36] Counsel for Morrison also raised the alternative argument with the PCJ that, because the television broadcast allows for a text version of the spoken parts by way of closed-captioning technology typically used to aid hearing-impaired viewers, a written form of any spoken words is available at any time so long as viewers turn on the closed-captioning function of their televisions.

*Decision of the PCJ*

[37] In his reasons, the PCJ acknowledged that spoken words are insufficient to constitute a defamatory libel and that the episode was "visual and [oral]". However, he was satisfied that a defamatory libel had been published because:

> There is . . . some evidence of an association between the CBC and the reduction of the words in question into written form: It was the evidence of [Morrison] that on its website, CBC directs viewers to contact a firm by the name of CISION for the preparation of transcripts of its programs. As previously noted, a transcript of the broadcast was tendered in evidence, ostensibly prepared by the firm in question.

[38] The PCJ did not consider the alternative closed-captioning argument. The PCJ went on to state, because the episode was broadcast nationally, there was some evidence it was published by being "exhibited in public" for the purposes of section 299 of the *Code*.

*Decision of the Reviewing Judge*

[39] The applicants argued on the *certiorari* review that the PCJ erred by relying on the written transcript prepared by Cision as being some evidence of the publication of a defamatory libel because there was no evidence that any of them were responsible for the creation of the transcript or any third party having read it. The reviewing judge dismissed this submission by stating, if the PCJ erred, the error did not amount to a jurisdictional error. He stated in his reasons (at paras 50-52):

> I reiterate that the learned Provincial Court judge decided that the transcript of the broadcast was sufficient publication within the meaning of s. 299. If the learned Provincial Court judge erred in

> that finding, in my view, it does not go to the issue of his jurisdiction. I reiterate that an error in law, or in interpreting the law, is not an issue of jurisdiction.
>
> With respect to Karp, McKeown and Sawa, at the conclusion of the program, McKeown invited viewers to contact the CBC at its website with questions, input about the program, or suggestions for other broadcasts. Clearly, Sawa and Karp, as the producer and co-producer respectively of the program, would have been aware of this invitation by McKeown.
>
> Based on this evidence, for the purposes of this application, I am satisfied that the learned Provincial Court judge drew the inference that Karp, McKeown and Sawa all were aware that anyone who viewed the website would learn that they could get a copy of the transcript for the program. In my view, that is sufficient evidence for them to continue as co-defendants.

*Analysis and Decision*

[40] There are two aspects to the applicants' argument that process was issued against them without there being some evidence that they published a defamatory libel. Firstly, they argue that the charges allege publishing a defamatory libel by "broadcasting and rebroadcasting". They say that a broadcast of a television program consisting of spoken words and images may amount to slander, but not libel. Secondly, they submit that the PCJ could not rely on the transcript of the episode prepared by Cision for proof of publication because that was not the allegation in the charges and there was no evidence of how the transcript was acquired, that it was published to anyone other than Nygård, or that there was a nexus between the written transcript and any of the applicants.

[41] What is meant by the allegation of "broadcasting" in the charges is not controversial. The *Broadcasting Act*, SC 1991, c 11, which regulates

and gives a mandate to the CBC, defines "broadcasting" as follows:

> **Definitions**
>
> **2(1)** In this Act,
>
> ***broadcasting*** means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

See also section 35(1) of the *Interpretation Act*, RSC 1985, c I-21.

[42] More challenging is the question of whether a television broadcast can be an act of publication of a defamatory libel for the purposes of the criminal law. The starting point to that question is the distinction between "libel" and "slander" at common law.

[43] The distinction between libel and slander is anomalous, unique to the common law world and the product of a long conflict in English history over which courts had jurisdiction to deal with defamatory matters (see Peter F Carter-Ruck, His Hon Judge Richard Walker & Harvey NA Starte, *Carter-Ruck on Libel and Slander*, 4th ed (London, UK: Butterworths, 1992) at 17-32; Prof Alastair Mullis et al, *Gatley on Libel and Slander*, 12th ed (London, UK: Sweet & Maxwell, 2013) at para 3.8; and Raymond E Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed (Toronto: Thomson Reuters, 1999) vol 2 (loose-leaf updated 2016, release 4), at para 8.2).

[44] Soon after the demise of the Court of Star Chamber in 1641, English

common law courts accepted that the result of a slander of a private person could not be a crime; the criminal law in such circumstances only concerned itself with libel (see *Rex v Penny* (1697), 1 Ld Raym 153, 91 ER 999 ( KB)). The distinction between libel and slander has always been an essential characteristic of the criminal law in Canada, as Parliament has crafted criminal offences relating to defamatory statements in the *Code* using the medium through which the defamatory expression is transmitted and the fact it must be published to someone other than the complainant as essential elements (see sections 298 and 299 of the *Code*).

[45] The applicants rely on the comments of Ryan JA in *Grinshpun* that, "[s]poken words are insufficient to constitute a libel" (at para 37). In my view, the facts of *Grinshpun* are distinguishable. In that case, the spoken statement was from one person to another in a transient conversation. I agree with Ryan JA that such a spoken statement, if defamatory, is slander, not libel. However, the situation here is quite different and more nuanced. The oral statements in question were, in part, on reasonable inference, based on a written document, were in a permanent form (as they had been recorded as part of a video) and were disseminated on a mass scale by television broadcasting.

[46] The courts have struggled with the distinction between slander and libel for centuries as the ability to record and disseminate attacks on personal reputation and dignity has increased with technology, such as the printing press, radio, motion pictures, television and now the Internet. As technology has advanced, the law has adapted, albeit in not the most coherent or logical fashion. The LRCC noted in the report that, since the 17th century, the courts have been prepared to accept that an oral statement can be libelous if

it could be tied directly to a writing, such as a letter or a script. The LRCC stated it in its report (at p 14):

> The distinction between slander and libel creates problems in attempting to categorize modern broadcasts. For this reason, many provincial defamation statutes deem defamatory broadcasts to be libels. The fact that the defamation is orally communicated does not mean that the defamation is a slander. In *John Lamb's Case*, [(1610), 77 ER 822 (Star Ch)] it was stated that if a person was aware that what he was reading was a libel, any oral communication of it was also a libel. Moreover, it appears that such an oral communication is a libel whether or not the hearer realizes that the oral communication originates from a written statement. Consequently, the dominant position is that a defamatory radio broadcast read from a script is libellous, while an extemporaneous oral remark is slanderous. Similarly, defamatory words broadcast on live television appear to be libellous, if read from a script. A defamatory motion picture is a libel.

See also *Forrester v Tyrrell* (1893), 9 TLR 257 (Eng CA); *Youssoupoff v Metro-Goldwyn-Mayer Pictures Limited* (1934), 50 TLR 581 at 587 (Eng CA); and *Gatley on Libel and Slander* at para 3.9.

[47] The common law distinction between libelous statements based on words read from a written document, such as script, versus slanderous extemporaneous commentary, is not without its difficulties in the context of a television broadcast. This is particularly the case when a broadcast is live as opposed to recorded (see the report at p 14, footnote 42). The record here is that the episode was recorded and was not a live television broadcast. The content of the episode reasonably allows for the inference by a viewer that what the host, Mr. McKeown, said was scripted. It should not be forgotten he also had the role as the "writer" of the episode. It would also be highly unlikely the other individual applicants could perform their roles as

producer/director and co-producer of the episode without knowledge of and approval of the written script.

[48] However, it is more difficult to infer that the oral statements made by former Nygård employees during interviews by Mr. McKeown (except where Mr. McKeown repeated them in his narration) were tied to a written script. There is no suggestion or evidence that the ex-Nygård employees were acting or parroting what the applicants wanted them to say.

[49] In jurisdictions outside Manitoba, where the distinction between libel and slander still exists for civil purposes, the difficulty in distinguishing libel from slander in a case where broadcast technology is employed has typically been addressed by legislation. For example, a defamatory television broadcast in Ontario is deemed to be libel (see the *Libel and Slander Act*, RSO 1990, c L12, section 2; and *Shtaif v Toronto Life Publishing Co Ltd*, 2013 ONCA 405 at para 20).

[50] Professor Raymond Brown makes the point in *Brown on Defamation* that the unique aspect of television and motion pictures (what he calls "talking pictures") does not fit into the traditional common law understanding of slander because "much of what one hears can be understood only in the context of what is seen" (at para 8.3(3)). To similar effect, it is stated in *Gatley on Libel and Slander* that (at para 3.9):

> The showing of a defamatory cinema film is libel at common law and this cannot turn on the fact that the images are permanently visible on the film, so the same should apply to the showing of a DVD. Hence it is thought that the showing of a film or DVD on television would (even apart from statute) be libel at common law and perhaps the same is true of a recorded radio broadcast.

[51] In my view, such a conclusion is entirely consistent with the common law approach to distinguishing libel and slander. Firstly, a television broadcast, which can be recorded and published repeatedly (as was the case here), has a degree of permanence to the form of the communication which has been an important quality of libel historically (see *Monson v Tussauds Limited*, [1894] 1 QB 671 at 692 (Eng CA); and *Gatley on Libel and Slander* at para 3.6). Secondly, the harm a defamatory television broadcast can cause to a person's reputation is significant. Freedom of expression in a democratic society has never been accepted to be unlimited. Defamation laws co-exist with the right of freedom of expression because "the protection of the good reputation of an individual is of fundamental importance to our democratic society" (see *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 120). A television broadcast has the capacity for mass dissemination of defamatory statements made in it (certainly in the case of a national broadcaster such as the CBC), thereby creating at least as much harm to the personal reputation of a defamed person, if not more, than would be caused if the statement were printed in a newspaper, a well-accepted act of libel (see generally *Brown on Defamation* at para 8.3; and Paul Mitchell, *The Making of the Modern Law of Defamation* (Oxford, Oregon: Hart Publishing, 2005) at 24-30).

[52] It is not contentious from the content of Exhibit 1 that the episode created by the applicants was permanently recorded into a video that was broadcast nationally on the television network of the CBC on several occasions. In my view, those characteristics alone can reasonably support the inference that any potentially defamatory oral statements made about

Nygård in the episode were libel within the meaning of section 298 of the *Code*.

[53] I would reach a similar conclusion, by a different route under section 298 of the *Code*, that there was also some evidence presented by Morrison at the pre-enquete hearing that defamatory oral statements about Nygård in the episode were libel because the reasonable inference can be drawn that a written script was used, in part, in the television broadcast by the applicants.

[54] Regardless of how libel is established, the CBC has a legislative mandate under the *Broadcasting Act* to make its programming available throughout Canada, which it did in this case, and, while no evidence was led by Morrison as to how wide the publication of the episode was, given the unknown size of the audience for "the fifth estate", the accepted fact that it was broadcast nationally on the CBC's television network on multiple occasions is, by itself, some evidence of publishing to a third party within the meaning of section 299 of the *Code* (see *Gaskin v Retail Credit Co et al*, [1965] SCR 297 at 300; and *Kohuch and Loewen v Wilson* (1988), 71 SaskR 33 at paras 134-40 (QB)). In terms of the individual applicants apart from the CBC, by participating in the creation or production of the episode for the purpose of it being broadcasted by the CBC, there is some evidence of each of them publishing it (see *Gatley on Libel and Slander* at para 6.24; section 21(1) of the *Code*; and *Lysko v Braley* (2006), 79 OR (3d) 721 at para 90 (CA)).

[55] I make no comment as to the strength of the evidence against any of the applicants on an individual basis, the inferences that a trier of fact may

ultimately draw from the evidence or the defences the evidence raises for the applicants. In particular, it is unnecessary to address in this appeal the fact that the charges allege that each of the applicants published a defamatory libel in part by use of the CBC's "website". It is well understood that the nature of the Internet as a communication medium raises unique concerns regarding the question of "publication" separate and apart from a broadcast through a television network (see *Crookes v Newton*, 2011 SCC 47 at paras 16-43; *Shtaif* at paras 23-24; and Matthew Collins, *The Law of Defamation and the Internet*, 3rd ed (New York: Oxford University Press, 2010) at para 4.06).

[56] The concerns raised by the applicants of reliance on the written transcript produced by Cision for proof of the publication of a defamatory libel, in light of the wording of the charges and the reasonableness of the inferences drawn by the PCJ about their involvement in publication, do not ultimately assist them. Leaving aside the question of the merit of submissions, they fail on the basis that they do not raise a jurisdictional error.

[57] I agree with the reviewing judge that the PCJ's decision to rely on the transcript of the episode prepared by Cision as some evidence of the *actus reus* that a defamatory libel had been published, even if wrong, did not amount to a jurisdictional error. The technical arguments advanced by counsel for Morrison about proof of publication of a defamatory libel by way of the CBC making available a written transcript of its television broadcast of the episode from Cision, or the implications of closed-captioning technology, were no doubt rooted in the esoteric and often bedeviling distinction between libel and slander. Ultimately, I conclude that

it is unnecessary to enter the briar patch of deciding the correctness of those submissions which were accepted in part by the PCJ.

[58] The relevant question, given this is a *certiorari* proceeding, is whether there was some evidence at the pre-enquete hearing of the publication of a defamatory libel to negate the suggestion that a jurisdictional error was made by issuing process for the private prosecution. The common law, as I have explained, does recognize that an oral defamatory statement can, in some circumstances, amount to libel. Oral publication of a written defamation, such as reading from a script, is one example. Mass dissemination of an oral defamatory statement that is in a permanent form, such as a recording by use of technology, such as a motion picture or television broadcast, is another.

[59] In my view, based on the record before the PCJ, there was some evidence that a defamatory libel relating to Nygård was published by each of the applicants.

Issue Two—Hearsay Evidence at the Pre-Enquete Hearing

*Introduction*

[60] In *Vasarhelyi* (see paras 34-38), the Ontario Court of Appeal explained the differences between the two procedures in the *Code* that govern the issuance of process after an information has been laid pursuant to section 504. If the informant is a law-enforcement official, such as a peace officer, the process is governed by section 507. If the informant is a private citizen, the process is governed by section 507.1. While there is no issue that a law-enforcement official may rely on hearsay to support the issuance

of process, it is disputed that the same can occur in a private prosecution such as the case under appeal.

[61] The issue as to what hearsay evidence can be admitted and relied on at a pre-enquete hearing raises a question as to the relationship between sections 507.1 and 540(7) of the *Code* and whether, if the PCJ was incorrect in his interpretation of those sections, his error was jurisdictional, as opposed to legal, for the purposes of *certiorari* review.

*Proceedings at the Pre-Enquete Hearing*

[62] Counsel for Morrison submitted to the PCJ that the key exhibits, Exhibits 1 and 2, were admissible as business records. He also argued that it was permissible for Morrison to testify about information he did not have personal knowledge of for two reasons. The circumstances surrounding the hearsay information made it credible and trustworthy. Further, the Attorney General had notice of and access to the hearsay information before the hearing and could test its reliability at the hearing if necessary.

[63] Counsel for Morrison further advised that, if the Court required, he could make available one of Nygård's lawyers to confirm the authenticity of the correspondence between them and the CBC and its lawyers prior to the television broadcast of the episode.

[64] Morrison testified that he had reasonable grounds to believe the defamatory libel offences alleged had been committed. He based his belief on the DVD of the episode and supporting transcript prepared by Cision, the correspondence between the lawyers as to what the CBC had been told was false and defamatory of Nygård prior to the first television broadcast, and

discussions he had (and secretly recorded) between July and October 2010 with Jerry Forrester, an ex-FBI agent based in Miami, Florida (and Forrester's associate, Bradley Pratt (a former Bahamian police officer)), who allegedly had been hired by the CBC to assist it in the production of the episode.

[65] Counsel advised that he was in possession of the secretly recorded conversations made by Morrison, along with transcripts, but they would not be filed absent the PCJ wanting to review them. The PCJ did not request to do so.

[66] Morrison testified that, after identifying Forrester as the CBC's investigator, he approached him, posing as himself with a cover story that a European competitor of Nygård in the fashion industry had hired him to attempt to have a television broadcast produced in Europe about Nygård similar to the one aired by the CBC in Canada.

[67] Morrison advised that Forrester told him that he could assist in locating witnesses who could be bribed to make allegations about Nygård. Forrester told Morrison that he had offered to do this for Mr. Sawa, but Mr. Sawa had refused. He said, however, that instead of terminating the relationship, the CBC continued to retain him to assist it. Morrison described Forrester as having a "pathological hatred" towards Nygård. He said Forrester made the suggestion, "Let's make sure that Nygård will never sell another blouse".

[68] As previously mentioned, one of the documents Nygård's lawyers provided to the CBC was a copy of a statement of M.R. who denied anything improper had occurred on her visit to Nygård's residence in the

Bahamas in 2003. M.R.'s statement was dated April 8, 2010 and was witnessed by a lawyer in Santiago, Dominican Republic. In the episode, Mr. McKeown acknowledged that the CBC had been provided with M.R.'s statement. He told the viewers about its contents and then said that, despite making efforts, "the fifth estate" had not been able to locate M.R. to "try to get her side of the story".

[69] Morrison testified that, during a meeting at a hotel in New York City in August 2012, Forrester disclosed to him that he had authorized and paid for a "surveillance operation" in the Dominican Republic. Forrester gave Morrison a copy of a surveillance report of the operation that was filed at the pre-enquete hearing. The report states that, on April 8, 2010, operatives in the Dominican Republic received information from Forrester that Nygård's representative was travelling from Miami to meet with M.R. The operatives followed Nygård's representative from the airport in Santiago to a local restaurant where she met with M.R. for several hours. After the meeting, M.R. was followed. Morrison testified that Forrester told him that he had contacted the CBC about approaching M.R. but was told to "back off". Morrison testified that he believed that the statement made during the CBC's broadcast that "the fifth estate" could not locate M.R. to speak to her was a "total lie".

[70] Morrison was cross-examined by Crown counsel at the pre-enquete hearing. He acknowledged that, during his inquiries, he had no discussions whatsoever with Mr. McKeown, Mr. Karp, Mr. Sawa or any of the key people interviewed or otherwise relied on by the CBC for the production of the episode.

*Decision of the PCJ*

[71] The PCJ did not make evidentiary rulings during the calling of the evidence although he did alert Morrison's counsel to the issue that it was, as he put it, a "live issue" as to "what use can be made of hearsay" and "whether or not witnesses to proceedings need to be called". The PCJ also told counsel that it was improper for him to tell counsel what witnesses had to be called, it was up to counsel to decide how to call his case.

[72] In his decision, the PCJ noted that "virtually all of the evidence presented . . . was effectively hearsay", including virtually all of Morrison's evidence. He decided, however, to rely on the hearsay evidence in deciding to issue process. He stated:

> In the instant case, there is no suggestion that the Crown had not received reasonable notice of the intention to tender the noted exhibits, and certainly no objection was raised by Crown counsel to the introduction of the material in this form.
>
> I conclude that the documentary material submitted on behalf of the Informant is "credible and trustworthy", within the limited meaning of that phrase as it applies to applications pursuant to ss. 540, 507, and 507.1 of the Criminal Code. In doing so, I note [in] the sworn evidence before me that the allegations as to the conversations between the Informant and Jerry Forrester were tape recorded and transcribed. I also note that the statement of [M.R.], refuting the allegations of sexual impropriety on the part of Mr. Nygård, was notarized. I emphasize that in making this determination, I make no determination as to the ultimate credibility of Mr. Forrester, [M.R.], or any of the other individuals upon whom the Informant relies.

*Decision of the Reviewing Judge*

[73] The applicants argued on the *certiorari* review that the PCJ

exceeded his jurisdiction by issuing process for the private prosecution because he failed to follow the requirement in section 507.1(3)(a) of the *Code* to hear "the evidence of witnesses". The applicants argued that the PCJ was not entitled to admit and rely on hearsay evidence. Again, the reviewing judge dismissed this submission by stating, if the PCJ erred, the error did not amount to a jurisdictional error. He stated in his reasons (at para 39):

> In my view, the learned Provincial Court judge had the jurisdiction to make this finding. I am satisfied that, whether this finding is correct in law, is not an issue that I can or should decide in this application for *certiorari*.

[74] The reviewing judge also went on in *obiter* to comment that the case presented at the pre-enquete was not entirely hearsay. He noted that, "the correspondence exchanged between the CBC, its lawyers and Nygård's lawyers, prior to the airing of the program, contained evidence that was both admissible and relevant. That correspondence supported the charges" (at para 41). He ultimately stated (at para 44):

> In my view, all of the correspondence that was tendered before the learned Provincial Court judge was clearly admissible at the *ex parte* hearing and will, in all likelihood, be admissible at trial. Leaving aside Morrison's testimony, if the prosecution can prove at trial that some or all of the information contained in the letters from Nygård's lawyers is true, and the applicants went ahead and broadcast the program in the face of that evidence, some or all of the applicants may be guilty of defamatory libel.

*Analysis and Decision*

[75] There are two aspects to the applicants' argument that a jurisdictional error occurred in the PCJ admitting and relying on hearsay to

make his decision to issue process for the private prosecution. The first part of the submission is policy based. The other aspect relies on principles of statutory interpretation.

[76] The policy-based submission is not contentious. There is a legitimate concern that the right to commence a private prosecution can easily be abused. This concern is long standing. Miller CJM warned in *Campbell v Sumida*, [1965] 3 CCC 29 (Man CA) (at p 39):

> I am greatly concerned with this possibility—that if we accept the argument of the informant, we unnecessarily widen the field of prosecution of Her Majesty's subjects to any obsessed, vindictive, unscrupulous, self-styled public saviour. Her Majesty's subjects are entitled to freedom from unwarranted prosecution. They should not be called upon to defend themselves from unjustifiable charges at their own expense. Even a successful defence is not only costly but can leave a blemish on the reputation of an innocent citizen.

See also *Mandelbaum v Denstedt* (1969), 66 WWR 636 at 638 (Man CA).

[77] Prior to passage of the *Criminal Law Amendment Act, 2001*, the procedure in the *Code* as to whether process should issue after the laying of an information was the same regardless of whether the informant was a law-enforcement official or a private citizen. Hearsay evidence from the informant could be relied upon to establish a prima facie case unless the justice felt it "desirable" to hear witnesses. Where the informant lacked sufficient details to establish a prima facie case, evidence from witnesses was "necessary" for process to issue (see *Whitmore* at p 565).

[78] The applicants say that Parliament created a new procedure in the *Criminal Law Amendment Act, 2001* to deal with the issuance of process for

a private prosecution because it wanted to ensure that there were appropriate safeguards put in place that would allow for strict scrutiny of private prosecutions at their commencement. They argue that proper oversight comes from mandatory involvement in the process by the Attorney General and from the judiciary using a different, more stringent procedure than what is followed under section 507. The subsequent case law supports the applicants' interpretation of the policy underlying section 507.1 (see *Edge* at paras 74-77, 91; *McHale #1* at paras 47, 65, 69; *Friesen* at paras 9-11; and *Ambrosi v British Columbia (Attorney General)*, 2014 BCCA 123 at paras 23-24, leave to appeal to SCC refused, [2014] SCCA No 320).

[79] The statutory interpretation argument of the applicants as to exactly what is meant in section 507.1(3)(a) of the *Code* as to the court's obligation to hear and consider "the allegations of the informant and the evidence of witnesses" raises more difficult questions. Another policy aspect to the *Criminal Law Amendment Act, 2001* was the modernization of criminal procedure to allow for the admission and reliance on hearsay evidence in pre-trial procedures in certain situations (see section 540(7) of the *Code*). The PCJ's interpretation of the *Code* that section 540(7) allowed him, in deciding whether to issue process, to rely on hearsay evidence if it was "credible or trustworthy", is supported by precedent (see *McHale v Attorney General (Ontario)*, 2011 ONSC 4535 at paras 20, 37 (*McHale #2*)).

[80] If the applicants' submission is reduced to its bare essentials, the argument is a simple one that flows from the safeguard function of a pre-enquete hearing in the case of a private prosecution. The applicants say that a private-citizen informant, unlike a law-enforcement official, is required by the specific wording of section 507.1(3)(a) of the *Code* to call the witnesses

who have personal knowledge of the facts surrounding the offence in question. The statute provides for no exceptions. The applicants rely on the different wording used in sections 507 and 507.1 which they say must be given meaning. The applicants argue that, if hearsay evidence could be received under section 507.1, as it can under section 507, then there was no need for Parliament to use different wording in the two sections. In support of their position, the applicants rely on comments made by Allen PJ in *Edge* (at paras 91, 93, 99):

> In this context, the grammatical and ordinary sense is that the word "and" in s. *507.1* is conjunctive so that process can only be issued when the allegations of the informant are heard as well as evidence of witnesses. It follows then if no witness is called no process may issue. Reference to other related sections supports the proposition that witnesses must be called. If the hearing were meant to be the same type of hearing as one held under *s. 507(1)(a)* the exact same phraseology would have been repeated. This latter section limits the calling of witnesses a discretionary call of the judicial officer who hears the allegations of the informant. No similar limiting words are found within *s. 507.1(3)*.
>
> Where proof of the *prima facie* case depends on witnesses other than the informant, those witnesses need to testify in the same manner. The absence of witnesses to prove a *prima facie* case will mean that no process will be issued. Of course, the judge may, in appropriate circumstances, afford the informant the right to an adjournment to obtain further evidence. If no process is issued, the informant still has an alternative to reapply within six months if there is new evidence.
>
> The differences between the private informant and the *s. 507(1)* informants dictate a slightly different procedure. The private informant should be sworn even when making his or her allegations. Where the allegations are based upon information given to the informant by others, the informant is expected to call those witnesses.
>
> [emphasis added]

[81] The applicants submit that the wording of the *Code*, as explained in *Edge*, makes it clear that the shortcut of an informant relying on hearsay evidence is simply not permitted. In their view, section 540(7) has no application whatsoever to pre-enquete hearings because the Court is mandated by section 507.1(3)(a) to hear the evidence of witnesses to the offence. If that does not occur and process is issued, the applicants argue a jurisdictional error occurs because a mandatory pre-condition to the issuance of process has not been followed (see *Dubois* at p 377).

[82] The applicants say that, while Morrison was a witness to some of the events after the episode was broadcast on television, he had no first-hand knowledge of the key facts prior to July 2010. They argue that witnesses, such as M.R., Forrester and the lawyers for Nygård involved in the dialogue with the CBC before the first broadcast, needed to be called at the pre-enquete hearing before the PCJ could rely on facts relating to them to decide whether there was a prima facie case on each of the elements of the charges.

[83] The applicants also point out that the statutory provision that incorporates section 540(7) into a pre-enquete hearing is circumscribed. Section 507(3)(b) of the *Code* (which is applicable by virtue of section 507.1(8)) says that section 540 applies "in so far as that section is capable of being applied". Therefore, the applicants submit Parliament envisioned that all of section 540 may not necessarily apply to a pre-enquete hearing. Rather, the provisions of section 540 of the *Code* only apply to the extent that they do not create an inconsistency or incoherence with the requirement in section 507.1(3)(a) that the court hears from witnesses with first-hand knowledge of the facts.

[84] The applicants agree that sections 540(1)-(6) of the *Code* apply to pre-enquete hearings because those provisions ensure that a permanent record is created of the hearing and they also regulate the form that record will take. They say those parts of section 540 do not conflict with the purpose or wording of section 507.1.

[85] The applicants say, however, that incorporation of section 540(7) into a pre-enquete hearing is problematic. Sections 540(7)-(9) were enacted in the *Criminal Law Amendment Act, 2001* as part of the previously mentioned attempt by Parliament to modernize criminal procedure to improve the efficiency of pre-trial proceedings.

[86] It is now well accepted that section 540(7) of the *Code* allows for the prosecutor to have an accused committed for trial at a preliminary inquiry in whole or in part on hearsay evidence provided that it is credible or trustworthy and the prosecutor has given reasonable notice of his or her intention to introduce it as required by section 540(8). Where an accused wishes nevertheless to have a witness(es) produced for examination or cross-examination, he or she must make an application pursuant to section 540(9) and demonstrate that it is "appropriate" to have the witness(es) appear.

[87] The applicants argue that section 540(7) is not "capable of being applied" to a pre-enquete hearing, as required by section 507(3)(b), because the safeguards that exist on the use of section 540(7) in the case of a preliminary inquiry, sections 540(8) and (9), cannot be applied to a pre-enquete hearing for a fundamental reason. The significant difference between a pre-enquete hearing and a preliminary inquiry is, at the latter, the accused has the right to be present and be represented by counsel while, at

the former, he or she does not. The applicants further argue that the mere fact that the Attorney General will have notice of the hearsay information, and the ability to contest it, is not adequate safeguard because the Attorney General is not the accused's lawyer and plays a different role.

[88] The question of whether section 540(7) and section 507.1 can be reconciled together in light of the competing policy considerations in the *Criminal Law Amendment Act, 2001* was identified, but not decided, in *Vasarhelyi* (see para 58). A review of the reasons given in *Edge* and *McHale #2* makes it clear that the statutory interpretation argument advanced by the applicants as to the relationship between sections 507.1 and 540(7) of the *Code* was not before those courts. In the case of *Edge*, the applicant's argument that *Edge* illustrates that a court is not entitled to accept hearsay evidence as proof of the elements of the offences is a submission with some difficulties.

[89] In *Edge*, the informant, Mr. Durand, had previously testified before the Alberta Law Enforcement Review Board as to alleged mistreatment by police officers at a lounge after he had been drinking alcohol. Mr. Durand then brought a private prosecution for assault against one of the officers. At the pre-enquete hearing, Mr. Durand took the stand and, rather than testifying about his encounter with police, he simply said the evidence he gave previously before the Alberta Law Enforcement Review Board was true. A transcript of his evidence was filed as an exhibit. Allen PJ relied on the prior evidence of the informant and commented, "[t]his constitutes evidence that I can consider in issuing process" (at para 12).

[90] Generally speaking, prior consistent statements are not admissible

because they lack probative value and constitute hearsay when adduced for the truth of their contents (see *R v Dinardo*, 2008 SCC 24 at para 36). A witness is typically not excused from giving testimony in favour of simply adopting a prior consistent statement absent the consent of the other party or a statutory provision or common law rule allowing for receipt of the prior consistent statement. Consent is of course an impossibility in a pre-enquete hearing as the hearing is non-adversarial and the accused has no right to notice or to be present. I make this observation not to express any concern or disagreement about the decision in the *Edge*. Rather, I raise the facts of *Edge* to make the point that the applicants' position in their factum that the Court, in *Edge*, "did not accept hearsay evidence" is debatable. *Edge* can reasonably be read as a case where the Court implicitly relied on section 540(7) of the *Code* to admit and consider credible or trustworthy information that was otherwise inadmissible in the form presented.

[91] Distinctions between errors of law and errors of jurisdiction are subtle. In *R v MPS*, 2014 BCCA 338, Groberman JA explained the difference between a jurisdictional error and legal error in the following way in his discussion of the prior decision of the British Columbia Court of Appeal in *R v Rao*, 2012 BCCA 275, where the Court was divided as to whether the errors in question were jurisdictional or legal. He stated (at para 56):

> *Rao* illustrates the limits of *certiorari* in controlling the process at a preliminary inquiry. While a judge's refusal or neglect to follow a mandatory statutory provision will be characterized as a "jurisdictional error" and therefore be amenable to *certiorari*, an error of judgment in following a statutory provision will be characterized as a "mere error of law" and will not be amenable to prerogative relief.

[92] As previously mentioned, in order to issue process for a private prosecution pursuant to section 507.1(2) of the *Code*, the judge must have some evidence before him or her on every essential element of the offence. However, what does or does not constitute evidence for the judge's decision is a legal issue within the judge's jurisdiction. An error by a judge as to the admission or exclusion of evidence, or the application of the rules of evidence to a question a judge has jurisdiction to decide, is not a jurisdictional error (see *Attorney General (Que) v Cohen*, [1979] 2 SCR 305 at 310; *Forsythe* at pp 271-72; *Dubois* at p 377; and *R v Deschamplain*, 2004 SCC 76 at para 17). As Caldwell JA explained in *R v Beaven*, 2012 SKCA 59, "An erroneous evidentiary ruling under which the only evidence on an essential ingredient of an offence is admitted is not a jurisdictional error: *R. v. LeBlanc*, 2009 NBCA 84" (at para 26). See also *R c PM*, 2007 QCCA 414 at paras 32-40.

[93] The applicants' submission that the PCJ was not entitled by the wording of the *Code* to accept hearsay evidence in this case is an argument that goes to whether a legal error was committed. In my view, it is unnecessary to decide what is the correct relationship between sections 507.1 and 540(7) of the *Code* because the error alleged here cannot be said to be a jurisdictional error. As Watt JA noted in *Vasarhelyi*, section 507.1(3) requires the court to hear "the evidence of witnesses" but "the section does *not* specify or otherwise describe, in express words, the substance or kind of evidence that must or may be introduced on the inquiry" (at para 40).

[94] In my view, what evidence the PCJ could or could not receive and the form it had to take in deciding whether to issue process was a subject

within his jurisdiction. Unlike the situation in *Rao* (see paras 70, 72), the PCJ considered sections 507.1 and 540 of the *Code* and made a decision as to their meaning and relationship in terms of his determination whether to issue process for the private prosecution. The correctness of his decision is irrelevant for the purposes of a *certiorari* review because the misconstruction of a statute or misdirection on the law on a subject within the PCJ's jurisdiction is not a jurisdictional error (see *Vasarhelyi* at para 52).

Conclusion

[95] The reviewing judge applied the correct standard at the *certiorari* review by examining the PCJ's decision for jurisdictional, not legal, error. I have not been convinced that he was incorrect in deciding that the PCJ did not commit a jurisdictional error. On the record before the reviewing judge, I have not been persuaded that the PCJ refused to exercise his jurisdiction, acted in excess of it, lost it, or breached a principle of natural justice (see *Russell* at para 19). In the result, I would dismiss the appeal.

Mainella JA

I agree: Monnin JA

I agree: Steel JA

# APPENDIX "A"

## *Criminal Code* Provisions

**Parties to offence**
**21 (1)** Every one is a party to an offence who

**(a)** actually commits it;

**(b)** does or omits to do anything for the purpose of aiding any person to commit it; or

**(c**) abets any person in committing it.

**Definition**
**298 (1)** A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

**Mode of expression**
**(2)** A defamatory libel may be expressed directly or by insinuation or irony

**(a)** in words legibly marked on any substance; or

**(b)** by any object signifying a defamatory libel otherwise than by words.

**Publishing**
**299** A person publishes a libel when he

**(a)** exhibits it in public;

**(b)** causes it to be read or seen; or

**(c)** shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person.

**Punishment of libel known to be false**
**300** Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

**Punishment for defamatory libel**
**301** Every one who publishes a defamatory libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

**In what cases justice may receive information**
**504** Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

**(a**) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

**(i)** is or is believed to be, or

**(ii)** resides or is believed to reside,

within the territorial jurisdiction of the justice;

**(b)** that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

**(c**) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or

**(d)** that the person has in his possession stolen property within the territorial jurisdiction of the justice.

**Justice to hear informant and witnesses — public prosecutions**
**507 (1)** Subject to subsection 523(1.1), a justice who receives an information laid under section 504 by a peace officer, a public officer, the Attorney General or the Attorney General's agent, other than an information laid before the justice under section 505, shall, except if an accused has already been arrested with or without a warrant,

**(a)** hear and consider, *ex parte*,

**(i)** the allegations of the informant, and

**(ii**) the evidence of witnesses, where he considers it desirable or necessary to do so; and

**(b)** where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of

the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence.

**Process compulsory**
**(2)** No justice shall refuse to issue a summons or warrant by reason only that the alleged offence is one for which a person may be arrested without warrant.

**Procedure when witnesses attend**
**(3)** A justice who hears the evidence of a witness pursuant to subsection (1) shall

**(a)** take the evidence on oath; and

**(b)** cause the evidence to be taken in accordance with section 540 in so far as that section is capable of being applied.

**Summons to be issued except in certain cases**
**(4)** Where a justice considers that a case is made out for compelling an accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.

**No process in blank**
**(5)** A justice shall not sign a summons or warrant in blank.

**Endorsement of warrant by justice**
**(6)** A justice who issues a warrant under this section or section 508 or 512 may, unless the offence is one mentioned in section 522, authorize the release of the accused pursuant to section 499 by making an endorsement on the warrant in Form 29.

**Promise to appear or recognizance deemed to have been confirmed**
**(7)** Where, pursuant to subsection (6), a justice authorizes the release of an accused pursuant to section 499, a promise to appear given by the accused or a recognizance entered into by the accused pursuant to that section shall be deemed, for the purposes of subsection 145(5), to have been confirmed by a justice under section 508.

**Issue of summons or warrant**
**(8)** Where, on an appeal from or review of any decision or matter of jurisdiction, a new trial or hearing or a continuance or renewal of a trial or hearing is ordered, a justice may issue either a summons or a warrant for the arrest of the accused in

order to compel the accused to attend at the new or continued or renewed trial or hearing.

**Referral when private prosecution**
**507.1(1)** A justice who receives an information laid under section 504, other than an information referred to in subsection 507(1), shall refer it to a provincial court judge or, in Quebec, a judge of the Court of Quebec, or to a designated justice, to consider whether to compel the appearance of the accused on the information.

**Summons or warrant**
**(2**) A judge or designated justice to whom an information is referred under subsection (1) and who considers that a case for doing so is made out shall issue either a summons or warrant for the arrest of the accused to compel him or her to attend before a justice to answer to a charge of the offence charged in the information.

**Conditions for issuance**
**(3**) The judge or designated justice may issue a summons or warrant only if he or she

> **(a)** has heard and considered the allegations of the informant and the evidence of witnesses;
>
> **(b)** is satisfied that the Attorney General has received a copy of the information;
>
> **(c)** is satisfied that the Attorney General has received reasonable notice of the hearing under paragraph (a); and
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> **(d**) has given the Attorney General an opportunity to attend the hearing under paragraph (a) and to cross-examine and call witnesses and to present any relevant evidence at the hearing.

**Appearance of Attorney General**
**(4**) The Attorney General may appear at the hearing held under paragraph (3)(a) without being deemed to intervene in the proceeding.

**Information deemed not to have been laid**
**(5)** If the judge or designated justice does not issue a summons or warrant under subsection (2), he or she shall endorse the information with a statement to that effect. Unless the informant, not later than six months after the endorsement, commences proceedings to compel the judge or designated justice to issue a summons or warrant, the information is deemed never to have been laid.

**Information deemed not to have been laid — proceedings commenced**
**(6)** If proceedings are commenced under subsection (5) and a summons or warrant is not issued as a result of those proceedings, the information is deemed never to have been laid.

**New evidence required for new hearing**
**(7)** If a hearing in respect of an offence has been held under paragraph (3)(a) and the judge or designated justice has not issued a summons or a warrant, no other hearings may be held under that paragraph with respect to the offence or an included offence unless there is new evidence in support of the allegation in respect of which the hearing is sought to be held.

**Subsections 507(2) to (8) to apply**
**(8)** Subsections 507(2) to (8) apply to proceedings under this section.

**Non-application — informations laid under sections 810 and 810.1**
**(9)** Subsections (1) to (8) do not apply in respect of an information laid under section 810 or 810.1.

**Definition of *designated justice***
**(10)** In this section, ***designated justice*** means a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter or, in Quebec, a justice designated by the chief judge of the Court of Quebec.

**Meaning of *Attorney General***
**(11)** In this section, ***Attorney General*** includes the Attorney General of Canada and his or her lawful deputy in respect of proceedings that could have been commenced at the instance of the Government of Canada and conducted by or on behalf of that Government.

**Evidence**
**540 (7)** A justice acting under this Part may receive as evidence any information that would not otherwise be admissible but that the justice considers credible or trustworthy in the circumstances of the case, including a statement that is made by a witness in writing or otherwise recorded.

**Notice of intention to tender**
**(8)** Unless the justice orders otherwise, no information may be received as evidence under subsection (7) unless the party has given to each of the other parties reasonable notice of his or her intention to tender it, together with a copy of the statement, if any, referred to in that subsection.

**Appearance for examination**
**(9)** The justice shall, on application of a party, require any person whom the justice considers appropriate to appear for examination or cross-examination with respect to information intended to be tendered as evidence under subsection (7).

**Attorney General may direct stay**
**579 (1)** The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

**When Attorney General does not stay proceedings**
**579.01** If the Attorney General intervenes in proceedings and does not stay them under section 579, he or she may, without conducting the proceedings, call witnesses, examine and cross-examine witnesses, present evidence and make submissions.

**Plea of justification necessary**
**612 (1)** The truth of the matters charged in an alleged libel shall not be inquired into in the absence of a plea of justification under section 611 unless the accused is charged with publishing the libel knowing it to be false, in which case evidence of the truth may be given to negative the allegation that the accused knew that the libel was false.

**Appeal in *mandamus*, etc.**
**784 (1**) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of *mandamus, certiorari* or prohibition.

**Application of Part XXI**
**(2)** Except as provided in this section, Part XXI applies, with such modifications as the circumstances require, to appeals under this section.