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LET'S BE CLEAR ABOUT "CLEAR AND CONVINCING": A POSTSCRIPT

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I) The 2007 Paper: The Civil Standard of Proof in Canada Pre-*McDougall*

At the 2007 CACOLE Annual Conference in Halifax, the Military Police Complaints Commission presented a paper entitled, "Let's be Clear about 'Clear and Convincing'". This paper examined the standard of proof applicable in matters of police discipline.

Of course, as everyone knows, in all non-criminal proceedings, which include police discipline adjudications, the civil standard of proof generally applies. Beyond this general proposition, considerable confusion reigned, in Canada at least, until last October, when the Supreme Court of Canada issued its decision in the case of *F.H. v. McDougall*.[1] As this decision addressed many of the issues raised in the 2007 paper, it seemed appropriate to prepare an update for this year's conference.

The paper presented at the 2007 Conference sought to explore and make some sense out of this then confused area of jurisprudence. The phrase used in the paper's title "clear and convincing" refers to an evidentiary requirement which some courts in Canada, and elsewhere in the common law world, had developed to deal with civil and administrative cases where extra care has been deemed warranted in assessing the case of the party bearing the burden of proof. The same concept went by various aliases in the case law. Synonymous terminology used by different courts over the years included references to the need for evidence that is "clear and cogent" or "cogent and compelling"; and also stipulations that tribunals needed to be "convinced" (rather than merely persuaded), the need for certain facts to be established with a "high degree of probability" or on the basis of "proof commensurate with the occasion", or references to the application of an "enhanced civil standard".

By whatever name, the legal requirement for some greater stringency in scrutinizing the evidence in certain categories of civil or administrative cases involving particularly serious allegations or consequences for the person whose actions were the subject of the proceedings was well established in the jurisprudence. Police disciplinary proceedings, as well as those of other professionals, were among those thought to be subject to such a requirement.

The main source of debate in the Canadian jurisprudence had been whether this enhanced stringency applicable to such proceedings was properly conceived of as: 1) a requirement for greater care in the weighing of the evidence; or 2) for a higher threshold of persuasion, i.e., an enhanced standard of proof. The relevant jurisprudence was complicated by the fact that courts and adjudicators often were not explicit as to which concept they were applying, while some others were clearly skeptical about there being any real difference between the two.

[1] 2008 SCC 53, 2008 CarswellBC 2041, also reported under the name *C.(R). v. McDougall*.

To further muddy the waters, the second school of thought (i.e., the enhanced standard of persuasion) broke down into two distinct models: one which viewed the balance of probabilities standard itself as a shifting standard encompassing varying degrees of probability; and another which conceived of a third intermediate standard of proof located somewhere between the ordinary civil standard and the criminal standard.[2] This latter model has been widely adopted in the United States, but had also made inroads in Canadian courts, especially in British Columbia.

The paper which we presented in 2007 took the position that the better view of the jurisprudence was that there were only two standards of proof in terms of the required degree of persuasion: the criminal standard and the ordinary civil standard. In fact, the paper took the position that the existence of more than one civil standard of proof, or of a shifting standard, had been firmly rejected by the Supreme Court of Canada in 1982 in *Continental Insurance Co. v. Dalton Cartage Ltd.*,[3] a short unanimous decision written by Chief Justice Laskin. Unfortunately, not everyone seemed to recognize this fact,[4] and so the confusion continued – until *McDougall*, that is.

Happily, with *McDougall*, the foregoing jurisprudential debates and distinctions explored and analyzed in our 2007 paper now appear to be largely matters of historical interest. The Supreme Court of Canada has spoken loud and clear: there is only one civil standard of proof known to Canadian common law, proof on a balance of probabilities, and neither the seriousness of the allegations, nor of the proceeding's consequences, mandates any special scrutiny or weighing of the evidence.

II) *F.H. v. McDougall*

McDougall was an appeal from British Columbia in a civil action for damages in respect of sexual and physical abuse at an Indian Residential School in B.C. which occurred in the late 1960s. The case came down to a determination of the relative credibility of the plaintiff versus the defendant. The trial judge found in favour of the plaintiff. The B.C. Court of Appeal overturned the judgment of the trial court with respect to the finding of sexual assault.

A majority of the appeal panel concluded that the trial judge did not take sufficient account of inconsistencies in the plaintiff's evidence in accepting it over that of the defendant. The Court of Appeal deemed this to represent a misapplication of the

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[2] A variant approach, which has sometimes been adopted by courts in the United Kingdom, has been to apply the criminal standard of proof (i.e., proof "beyond a reasonable doubt") in certain non-criminal cases. However, UK courts themselves have never been entirely comfortable with this approach and it has been firmly rejected in Canada.

[3] [1982] 1 S.C.R. 164, 131 D.L.R. (3d) 559, 1982 CarswellOnt 372.

[4] To be fair, part of the problem was that while Laskin CJC himself was clear in his own words that there was but one civil standard which did not shift, he unfortunately quoted a passage from Lord Denning's opinion in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), which contained language to the contrary: that the civil standard encompassed different "degrees of probability" depending on the gravity of the case. While the Chief Justice did try to place a particular interpretation on this quoted passage, it was difficult to reconcile this interpretation with his general approval of Lord Denning's words.

standard of proof and, therefore, an error of law warranting appellate intervention. The standard of proof applied by the B.C. courts in this case was one of proof that is "commensurate with the occasion", an elevated standard of proof which also goes by the name "clear and convincing evidence" in the relevant jurisprudence.

On further appeal to the Supreme Court of Canada, the Court allowed the appeal and restored the trial court judgment. Reasons for the unanimous decision were written by Justice Rothstein. Justice Rothstein briefly summarized the jurisprudential state of play in Canada regarding the different approaches adopted by courts faced with deciding particularly serious issues in a civil or administrative context. He then went on to address the most recent U.K. jurisprudence on this issue and, in particular, the June 11, 2008 decision of the House of Lords *In re B (Children)*,[5] which, in fact, was brought to the Court's attention subsequent to the hearing of the appeal.

The Court noted that the unanimous conclusion of the House of Lords *In re B* was that there was no intermediate or shifting standard of proof at common law. The Court quoted from the speech of Lord Hoffmann:

> Some confusion has however been caused by dicta which suggests that the standard of proof may vary with the gravity of the misconduct alleged or even the seriousness of the consequences for the person concerned.[6]
> ….
> I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.[7]

The Court further cited Lord Hoffmann's view that the account to be taken of the inherent probability or improbability of an event was a matter of common sense and not a rule of law, thus clarifying an aspect of the judgment of Lord Nicholls of Birkenhead in the earlier case of *In re H and Others (Minors)*,[8] a decision referenced in the 2007 paper.

The Court also quoted as follows from the leading opinion in the House of Lords' decision *In re B*, that of Baroness Hale: "Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. ….As to the seriousness of the consequences, they are serious either way. …. As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability."[9]

Turning to its own decision in the case before it, the Supreme Court endorsed the position of the House of Lords *In re B*, stating, in the words of Justice Rothstein:

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[5] [2009] 1 A.C. 11, [2008] 3 W.L.R. 1, [2008] UKHL 35.
[6] *In re B*, *supra* note 5, at para 5.
[7] *In re B*, *supra* note 5, at para. 13.
[8] [1996] A.C. 563 (H.L.).
[9] *In re B*, *supra* note 5, at paras. 70 and 71.

> …I think the time has come to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.[10]

The Court then expressly rejected the various approaches (i.e., all those canvassed in the 2007 paper) wherein either an elevated persuasive threshold or more careful weighing of the evidence was thought to be required due to the gravity of the allegations or of the proceeding's consequences, or to the inherent improbability of relevant events.

The Court adverted to the same practical problems with articulating a second civil standard of proof as those noted in the 2007 paper: namely, the difficulty of decision-makers in articulating, or even conceiving of, a standard of proof which was at once greater than the balance of probabilities, but which could also be convincingly distinguished from the criminal standard. The Court concluded that "the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred."[11] The Court also reaffirmed its rejection of any extension to civil matters of the criminal standard of proof, regardless of the subject of the proceedings.[12]

The Court was equally dismissive of the notion of a more careful approach to the weighing of evidence in certain more serious cases. Thus, even the more conservative doctrine previously laid down by the Court in *Dalton Cartage* is effectively overruled. Justice Rothstein for the Court wrote:

> To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
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> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing

[10] *McDougall, supra* note 1, at para. 40.
[11] *McDougall, supra* note 1, at para. 44.
[12] *McDougall, supra* note 1, at paras. 39-42.

> and cogent to that judge that the plaintiff satisfied the balance of probabilities test.[13]

Finally, the Court concluded its analysis of the standard of proof issue in the judgment with the reaffirmation that "in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."[14]

III) Implications of *McDougall*

To quote the Case Annotation by Professor Don Stuart of Queen's University,[15] the Supreme Court's decision in *McDougall* "achieves welcome clarity" on the subject of the standard of proof in civil and, by extension, administrative matters. The decision greatly simplifies the law on standard of proof.

Of course, the essential task of deciding closely contested factual disputes, particularly in civil and administrative cases involving grave allegations or serious consequences, remains a challenging and, at times no doubt, a draining one. However, at least judges and adjudicators can now focus more of their attention and energies on weighing the evidence and less on selecting and articulating the type of scale they are using. Cases will be difficult to decide to the extent that the facts are difficult to determine on the basis of the evidence, not because of any legal rule artificially imposing a heightened skepticism towards the evidence of the side bearing the burden of proof.

The weighing of evidence, including the assessment of its strengths and weaknesses, both on its own and relative to competing evidence, is now, also as a result of *McDougall*, that much more firmly and clearly a question of fact, rather than one of law. By affirming the existence of only the one civil standard of proof that a fact in issue is more likely than not, it will now become harder to characterize a judge's assessment of evidence as a misapplication of the standard of proof which could justify intervention by a reviewing or appellate court. The Court makes it clear that, so long as decision-makers seem to be aware of the strengths and weaknesses of the evidence, they are not to be second-guessed on review or appeal with respect to the weight or emphasis placed on such strengths or weaknesses, absent "palpable and overriding error".

As previously stated, the Court's decision addresses many of the issues and concerns raised in our 2007 paper. Many of the debates and distinctions in the jurisprudence which were explored in the paper have been rendered moot. Moreover, a considerable amount of the case law that was referenced in the 2007 paper has now been invalidated or superseded, at least so far as the standard of proof is concerned.

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[13] *McDougall*, *supra* note 1, at paras. 45-46.
[14] *McDougall*, *supra* note 1, at para. 49.
[15] 2008 CarswellBC 2041.

Of course, the Supreme Court's decision directly affects only the jurisprudence regarding the civil standard of proof at common law. Any legislative stipulation of the applicable standard of proof or approach to evidence in proceedings remains in force. Despite all of the case law, however, notions of elevated civil standards of proof, such as requirements for "clear and convincing evidence", appear to have made few inroads in Canada in the legislative realm. Interestingly, however, among the very few references to "clear and convincing evidence" in all of Canadian legislation (at both the federal and provincial and territorial levels, and including regulations) are those which are found in the statutory provisions governing police disciplinary proceedings in Manitoba and Ontario.

It will be interesting to see how the relevant tribunals in Manitoba and Ontario interpret and apply their statutory requirements for "clear and convincing evidence" in light of the *McDougall* decision. Rules of legislative interpretation require that those applying these provisions try to give them some remedial effect. There is a strong presumption against finding legislative language to be superfluous. The phrase "clear and convincing evidence" is not substantively defined in legislation. Its origins are in case law and that is the only logical place to look for meaning. In a sense, the legislature is commanding police discipline tribunals in these jurisdictions to apply and give meaning to a distinctive standard of proof which the Supreme Court has said no longer exists and perhaps never really did.

However, while the Supreme Court in *McDougall* has clearly held that there is only one civil standard of proof, it did not say that there was no such thing in law as "clear and convincing evidence". Rather, the Court stated that when judges (and, by extension, administrative tribunals) find that they are persuaded of a fact on a balance of probabilities, they must be taken to have found the evidence to be sufficiently clear and convincing, or clear and cogent. In other words, what some jurisprudence had previously and erroneously taken to be a distinct and somehow stricter approach to evidence in certain cases was, in reality, nothing more or less than what courts do, and have always done, in all cases. As a result, it could be argued that the Manitoba and Ontario provisions can be interpreted as consistent with the common law post-*McDougall*.

Of course, others may well resist such an interpretation as effectively negating what may have been considered a victory for police unions in securing an evidentiary standard or requirement which provided some additional protection for their membership over and above that of ordinary civil defendants. If this argument prevails, police discipline tribunals in Manitoba and Ontario may find themselves in the unenviable position of having to rely on a line of jurisprudence regarding approaches to evidence which has been effectively repudiated. At the same time, all the conceptual and practical flaws associated with such approaches which contributed to their repudiation in *McDougall,* will still be there.