CITATION: R. v. Batista, 2008 ONCA 804
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COURT OF APPEAL FOR ONTARIO

Sharpe, Lang and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

And

Antonio Batista

Appellant

Clayton Ruby, for the appellant

Megan Stephens, for the respondent

Heard: November 4, 2008

On appeal from the conviction entered by Justice James J. Keaney of the Ontario Court of Justice, dated July 27, 2007.

Lang J.A.:

OVERVIEW

[1] The appellant wrote and posted a "poem" on five mail and newspaper boxes in his neighbourhood. The poem was about the appellant's city councillor, Pat Saito. The poem came to the attention of Pat Saito, who brought it to the attention of the police. The appellant was charged with uttering a threat to cause death and intimidation. He was convicted of uttering a death threat after a two-day trial. The charge of intimidation was

stayed pursuant to the *Kienapple* principle. By way of sentence, the appellant received a conditional discharge, subject to a 12-month term of probation. The appellant appeals his conviction.

[2] In my view, for the reasons that follow, this appeal must succeed. While the trial judge made no error in excluding the expert evidence tendered by the defence, he did err in finding that a reasonable person, looking at the poem objectively, and informed of all the circumstances, could conclude that the questioned words conveyed a threat of death. As amateurish, foolish and offensive as the poem was, absent this essential element, the appellant did not commit the crime of threatening death.

BACKGROUND

[3] The appellant, a retired labourer, was 73 years old at the time he wrote the poem. Pat Saito, who was the subject of the poem, was his city councillor. The appellant testified that he wrote the poem in frustration over Ms. Saito's responses, and delayed responses, to his communications with her office. Those communications, which began in 2003, initially included the appellant's concerns about development issues in his community of Churchill Meadows in Mississauga. The appellant also raised concerns about illegal parking. On November 4, 2005 the appellant wrote Ms. Saito again, this time about the fact that his property tax bill included taxes from 2001, a year when he did not own the property. The appellant was unhappy that he could not reach Ms. Saito personally. On one occasion, her office said that she was at home ill. On another occasion, Ms. Saito's office told the appellant that she was on vacation. Although Ms. Saito's staff drafted a response to the appellant's complaint, as a result of computer error, the response was not mailed to the appellant. Consequently, the appellant did not receive a written response to his November property tax concern until Ms. Saito's letter of January 11, 2006.

[4] These circumstances left the appellant dissatisfied with the councillor's performance of her duties. The appellant had earlier read a newspaper article that reported that the councillor had jokingly suggested that potholes could serve the purpose of slowing traffic. It was this reference to potholes that provided the appellant with the idea for his poems. On January 2, 2006, he sent other members of city council, but not Ms. Saito, an anonymous poem that was not the subject of any charges. That poem read:

What is good or bad with

Mrs. Pat Saito

Pat Saito wonders around the City of Mississauga

She Goes pat pot
pat pot Ai ai ai

Why, Why? Why?

Does Mrs. Saito thinks

she satambles but
does not fall down.

She comes arround CHURCHILL MEADOWS
That is her Ward and gets disapointed
Because She sees no pot holes
But She sees a cheating hole
She sees a House that was sold
for more than One hundre dollars (100,ooo)
than the owner paid for when
He bought it in the year 2001

She did not knock on the
to say helow but she saw
a loop hole and said
They are going to pay the TOW

So in the Year 2006 she decided
to Make the Owners for Churchil
Meadows pay the taxes again
for the Year of 2001

But when the owners wrote letters
and the phoned in for answers
She was not in.She was Home Sick.
One month later Mrs. Saito was not
at work yet but on Holidays.

That the money fals
From the sky?

Why why why is She
Is She looking for Pot
holes when she showd be
in the office doing
her work?

Why Why Why have we
to pay so much for her
to be looking for pot
holes or lookimg at the
Sky?

This is from
the
Bed Wolf

[5] In his evidence, the appellant, who immigrated from Portugal with only three years of education and had some difficulty with the English language, indicated that he intended the January 2 poem to be from the Bad Wolf rather than the Bed Wolf.

[6] Later in January or at the beginning of February, the appellant posted the poem that was the subject matter of the criminal charges:

Parked cars and pot holes in the City of Mississauga

Pat pot, patch pot
look here look there
pat pot patch pot
there is a car parked here
. there is a car parked in there.

Now this bad driver that

WE only know as Pat Saito
who run away from thataccident
site is going to think twice
before backing up and looking at

pot holes instead of doing
Her job

This kept a Good looking
old Lady away from her
working place and
by looking at pot holes She
thought about about doing
nothing and winning the Race

There She marched back and forth
one two, one two
one two three four
one two, three four

But on the way back
to Her working place
She got lost on the fog
and could not keep up
with the running traffic
and She lost the race.

When She got to Curchill Meadows
She was out off the Race
but She was too far behind in
her work,and witout thinking
She backed up and without making
sure that it was safe to do so
She provoked a big accident

We are going to dig a pot hole
about six feet long and 3 feet wide
and five feet deep to hide
her body and God will take care
of Her Soul, but We can not
forgive her for doing nothing

She can keep running
at a good pace but
We will make sure
that She is in HEAVEN
and out of the Race.

So please GOD take care
of this SOUL for ever and
EVER.

The poem ended with a photograph of Pat Saito and the line “Do You know Her?”

[7] An off-duty parking enforcement officer, who saw the poem posted on his community mailbox, brought it to the attention of Pat Saito’s office. Pat Saito’s office brought the poem to the attention of the police. As a result of his earlier correspondence with Pat Saito’s office, the appellant was interviewed. Although, he initially denied authorship, he offered the view that the writer would have intended the poem to be in fun. Later in the interview, the appellant admitted his authorship. The appellant gave evidence that it was never his intention to threaten, frighten, or intimidate Ms. Saito, but simply to express his view to his community that the councillor was not doing her job as their elected representative. His stated purpose in posting the poem was to bring his frustration to Ms. Saito’s attention to influence her to perform her job better.

THE TRIAL JUDGE'S REASONS

[8] In his reasons, the trial judge noted the appellant's denial of any intention to threaten Ms. Saito with the posting of the poem. He acknowledged the defence position that the poem was "satire, intended to be in jest". He considered the defence request to tender an expert opinion to assist the court in understanding "satire" as a means of expression in which words are not meant to be taken literally, but are written to ridicule the subject's vices or failings. The trial judge concluded that the expert opinion was not necessary to assist the court with determining whether an objective reasonable person could consider the poem a threat or with whether the appellant intended the threat to be taken seriously. Thus, he excluded the opinion.

[9] The trial judge considered the individual reactions of those who read the poem, as well as the appellant's initial denial of authorship. The trial judge rejected the appellant's evidence that he posted the poem because he was shy about going door-to-door to speak with his neighbours about his concerns. The trial judge also concluded that the appellant harboured a long-standing animus towards the councillor.

[10] The trial judge dealt with the defence's freedom of expression argument by observing that a threat is not protected by s. 2(b) of the *Charter* simply because the councillor was an elected figure. For this reason, he concluded that s. 2(b) was irrelevant. The trial judge then reviewed the last three stanzas of the poem "through the eyes of a reasonable person." The trial judge considered the author's use in those stanzas of the first-person plural, his reference to dimensions similar to those of a grave, and his choice of words such as "soul" and "Heaven". Based on those references, the posting of the poem, the appellant's lack of understanding of the word "satire", and a finding with respect to the appellant's pre-existing relationship with the councillor, the trial judge concluded that the offending stanzas constituted a threat. The trial judge characterized the appellant's evidence and arguments denying an intention to threaten as not supporting a "defence that the words were written in jest". In finding the accused guilty of uttering a threat to cause death, the trial judge held that the "actions of the accused crossed the line from permissible political comment to prohibited criminal conduct".

ISSUES

[11] The appellant argues that the trial judge erred in finding that a reasonable person would view the poem as a threat because he failed to consider, or to consider properly, the context in which it was written and refused to admit expert evidence to assist him with this issue. He also argues that the trial judge erred in his analysis of the necessary *mens rea* for the offence, and in his finding that s. 2(b) of the *Charter* was not engaged. Finally, the appellant argues that the verdict was unreasonable.

ANALYSIS

1. The Elements of the Offence

[12] Section 264.1(1)(a) of the *Criminal Code* provides that every one commits an offence who, in any manner, "knowingly utters, conveys or causes any person to receive a threat (a) to cause death … to any person".

[13] In *R. v. McCraw*, [1991] 3 S.C.R. 72, at p. 82, the Supreme Court of Canada describes the purpose of the offence as one to "protect against fear and intimidation." Writing for the court, Cory J. explained that s. 264.1(1)(a) was enacted "to protect personal freedom of choice and action, a matter of fundamental importance to members of a democratic society."

[14] *McCraw*, at pp. 82-83, instructs that whether the impugned words constitute a threat, which it describes as a question of law rather than one of fact, should be approached looking at the matter objectively from the perspective of the ordinary reasonable person:

> The structure and wording of s. 264.1(1)(*a*) indicate that the nature of the threat must be looked at objectively; that is, as it would be by the ordinary reasonable person. The words which are said to constitute a threat must be looked at in light of various factors. They must be considered objectively and within the context of all the written words or conversation in which they occurred. As well, some thought must be given to the situation of the recipient of the threat.
>
> The question to be resolved may be put in the following way. *Looked at objectively, in the context of all the words written or spoken and having regard to the person to whom they were directed, would the questioned words convey a threat of serious bodily harm to a reasonable person?* [Emphasis added.]

[15] At p. 86, *McCraw* also observes that the impugned words must be construed as they would be "by the average reasonable person".

[16] This approach was further explained by the Supreme Court of Canada in *R. v. Clemente*, [1994] 2 S.C.R. 758, where, at p. 763, Cory J., writing for the court, stated:

> To determine if a reasonable person would consider that the words were uttered as a threat the court must regard them

> objectively, and review them in light of the circumstances in which they were uttered, the manner in which they were spoken, and the person to whom they were addressed.

[17] Further, the Crown does not satisfy its onus if the reasonable person would understand that the poem was made in jest or in such a way that it could not be taken seriously. As Cory J. said in *Clemente* at p. 762, "it is the meaning conveyed by the words that is important. Yet it cannot be that words spoken in jest were meant to be caught by the section."

[18] Thus, the Crown is required to prove two elements essential to the offence of uttering a threat. These elements are described in *Watt's Manual of Criminal Jury Instructions* (Toronto: Thomson Canada Limited, 2005), at p. 507, which I summarize. First, the Crown must establish that the appellant made a threat to cause the councillor's death; and second, that he made the threat knowing that it would be taken seriously.

[19] To satisfy the first element, the Crown is required to prove that, when viewed objectively, an ordinary reasonable person would consider the appellant's poem amounted to a threat to cause Ms. Saito's death. In considering whether a threat was made, the ordinary reasonable person would take into account all the circumstances, including the manner in which the words were communicated, the audience to whom it was addressed and the relationship between the writer and the subject of the alleged threat.

[20] The determination of whether the poem constitutes a threat in law requires a reasonable person to consider the context or circumstances in which it was made. Before arriving at a conclusion whether the impugned words or gestures constitute a threat, a court must consider all the circumstances both individually, and as a whole.

[21] Mindful of the legal test for a threat, I turn to the context of the appellant's poem, including the context of the *Criminal Code's* purpose of protecting against fear and intimidation and of protecting personal freedom of choice.

2. Is the poem a "threat"?

[22] In considering whether the questioned words constitute a threat, the reasonable person would consider all the circumstances. The circumstances relied upon in this case include the perception of threat by the witnesses, the context of the relationship between the appellant and the councillor, the questioned words in the light of the appellant's poem as a whole, the manner in which the poem was distributed and its character as political commentary. I will consider each of these circumstances in turn and then as a whole to inform the question of whether the impugned words constituted a threat at law.

(a) The Reasonable Person

[23] An ordinary reasonable person considering an alleged threat objectively would be one informed of all the circumstances relevant to his or her determination. The characteristics of a reasonable person were considered by the Supreme Court of Canada in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, in the context of the test for bias. In that case, L'Heureux-Dubé and McLachlin JJ., at para. 36, described such a person as a:

> reasonable, informed, practical and realistic person who considers the matter in some detail.…The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.

Similarly, in *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 282, in the context of the test for bringing the administration of justice into disrepute, Lamer J. for the majority describes a reasonable person as "dispassionate and fully apprised of the circumstances of the case": see also *R. v. Burlingham*, [1995] 2 S.C.R. 206, at para. 71.

[24] It follows that a reasonable person considering whether the impugned words amount to a threat at law is one who is objective, fully-informed, right-minded, dispassionate, practical and realistic.

[25] To support a conclusion that an ordinary reasonable person would have found the appellant's poem threatening, the Crown relies on the testimony of the parking enforcement officer, the investigating police officer and Ms. Saito concerning their reactions to the poem.

[26] In my view, while the opinions of the three witnesses may have been relevant, their evidence could not be determinative because their evidence amounted to a personal opinion that did not necessarily satisfy the requirements of the legal test. As the Supreme Court of Canada stated in *McCraw*, whether the impugned words amount to a threat is a question of law. None of the witnesses applied the legal test that asks whether a reasonable person, fully informed of the circumstances, considering the matter objectively, would consider the impugned words as a threat, nor were they asked to do so. In this case, neither the enforcement officer nor the police officer considered the poem in the light of all the circumstances. While Ms. Saito may have been distressed by the poem, her view was subjective rather than objective. The perspective of the reasonable person is different from that of the three witnesses relied upon by the Crown.

(b) The Context of the Relationship

[27] The reasonable person would consider the context of the relationship between the author and the subject of the poem as important to a determination of whether it constitutes a threat.

[28] The relationship between the appellant and Ms. Saito was obviously based upon the requests and complaints made by a constituent to his municipal councillor. From the subjective perspective of the appellant, the relationship was unsatisfactory. The councillor's office had been unresponsive or slow to respond to his inquiries and, in his view, the councillor was inexplicably distracted from her job by the potholes, an issue she apparently approached light-heartedly. From the councillor's perspective, the relationship was satisfactory because, to the best of the councillor's knowledge at the time, her office responded to the constituent's concerns, albeit latterly with some delay.

[29] The Crown concedes that the trial judge erred in his factual findings regarding the relationship between the appellant and the councillor. The trial judge found that the relationship caused Ms. Saito concern prior to her receipt of the poem. However, while Ms. Saito testified that she found the poem threatening, she did not link that concern to her pre-existing relationship with the appellant. The Crown describes this error as peripheral; however, in my view, the error is significant.

[30] The relationship between the appellant and the councillor provides context to whether the Crown satisfied the legal test that the poem constituted a threat. Even though the appellant had been complaining to the councillor over a prolonged period of time, nothing about the previous complaints, including the previous poem, caused the councillor to feel threatened. The factual finding to the contrary takes on particular significance because it immediately precedes the trial judge's conclusion "that the words written constitute a threat."

(c) The Structure of the Poem

[31] The trial judge's reasons do not reflect a consideration of the impugned stanzas of the poem in the context of the poem as a whole, or in the context of the appellant's earlier poem. Instead, the reasons appear to consider the impugned stanzas in isolation, separate from the context of the mocking tone and cadence – albeit inelegant and rudimentary – that are evident in the earlier stanzas. Like the first poem, the first stanzas are replete with attempts to rhyme or mimic nursery rhymes. The first stanzas highlight the author's perception of the councillor's interest or preoccupation with potholes, rather than with fulfilling the obligations of her job. This approach is further confirmed by the title "Parked Cars and pot holes in the City of Mississauga". As poorly written as the appellant's poem is, the earlier stanzas cannot but diminish what might otherwise be seen as an implicit threat if the later stanzas were read in isolation. It was incumbent on the

trial judge to situate the later stanzas in this broader context of the poem as a whole and the earlier poem and to consider whether the author's purpose may have been to mock the councillor for concentrating her efforts on potholes at the expense of other issues important to her constituents.

(d) The Context of Posting the Poem

[32] In addition, while the trial judge considered the fact that the poem was posted publicly, he did so primarily regarding the appellant's intention and whether the appellant could have instead gone door-to-door to discuss the councillor's job performance with his neighbours. On this issue, the appellant testified that he did not go door-to-door because he was shy. While there was ample evidence - especially the appellant's difficulties with the English language – to support the appellant's explanation, it was open to the trial judge to reject it as he did.

[33] However, it is also important on the question of the *actus reus* of the offence that the appellant did not surreptitiously or otherwise send the poem to Ms. Saito. Had the appellant done so, the last stanzas of the poem may have seemed more ominous to the informed person. By instead posting the poem in public areas on neighbourhood mailboxes, the appellant could be seen as engaging the community in the political process, rather than directing a threat against Ms. Saito. It is also noteworthy that certain characteristics of the poem permitted the police to easily identify the appellant as its author.

[34] These perspectives of the public posting were not considered by the trial judge in his reasons. Such conduct would belie the Crown's position that the "threat" in the poem was meant to be taken seriously.

(e) The Context of Freedom of Expression

[35] The appellant argues that the trial judge failed to consider s. 2(b) of the *Charter* in considering the context of the appellant's poem. Section 2(b) provides that everyone has fundamental freedoms, including "freedom of thought, belief, opinion and expression". The trial judge concluded that the *Charter* was not engaged because s. 2(b) does not operate to protect a threat on the basis that the threat was made to a public figure. This conclusion is correct. However, it also can be read, as argued by the appellant, to presuppose the answer to the question at issue: whether the poem constituted a threat.

[36] The appellant's argument, distilled on appeal, is not that s. 2(b) applies to protect threats to public representatives. Rather, the appellant argues that whether the appellant's poem constitutes a threat has to be decided in the light of the s. 2(b) right to freedom of expression, particularly freedom of expression in a political context. In other words, the

fundamental right of freedom of expression is a factor relevant to the determination of whether the statement constituted a threat just as is the fundamental right to freedom of choice and action protected by the criminalization of threats. Both freedoms must be considered and balanced.

[37] The Crown concedes that the right to freedom of expression is a fundamental value in a free and democratic society. That right, discussion of which long pre-dates s. 2(b), is of particular importance in the political context where freedom of expression, even offensive expression, functions to ensure open debate and equal participation in the political process: see *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 21. In *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 727, Dickson C.J., writing for the majority, referenced the certain "convictions fuelling the freedom of expression", including, at p. 728, the conviction that "participation in social and political decision-making is to be fostered and encouraged". At pp. 763-64, the court explained:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

These concepts are central to the tenets of a democracy.

[38] Even in circumstances where s. 2(b) has no direct application, such as in this case, nonetheless its fundamental values can operate as a relevant consideration. In *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, the Supreme Court of Canada, at para. 20, confirmed freedom of expression as a "fundamental Canadian value" that is expressed in the *Charter*, but that also informs the common law. *Pepsi-Cola*, also at para. 20, quotes McIntyre J.'s observation in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 583, that "[f]reedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational

institutions of western society." See also pp. 584-86 of *Dolphin Delivery*; *Boucher v. The King*, [1951] S.C.R. 265, at p. 288; *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306 and pp. 326-328; *Reference re Alberta Statutes*, [1938] S.C.R. 100, at pp. 132-33.

[39] Thus, even prior to the *Charter*, the case law recognized the vital role that freedom of expression plays in a democratic society.

[40] Several references in the trial judge's reasons show he was alive to the constituent/elected representative relationship between the appellant and Ms. Saito. However, those references do not consider the poem in the context of the importance of freedom of expression in the form of political commentary. In my view, the trial judge's conclusory statement that the "accused crossed the line from permissible political comment to prohibited criminal conduct" is insufficient to demonstrate a consideration of this context. Nowhere do the trial judge's reasons address the poem as political commentary or make reference to the appellant's imagery concerning the councillor's chances of winning an election "race".

[41] The poem's purpose of denigrating the elected councillor's level of job commitment or competence provides important context for a consideration of whether the impugned stanzas of the poem constitute a threat. All citizens are entitled to freedom of expression in the political forum, including those whose language skills are limited. While it was unnecessary for the trial judge to engage in the in-depth s. 2(b) analysis urged upon him by trial counsel, it was necessary to consider the poem as political commentary before determining whether it constituted a threat at law.

[42] In my view, considering all the above circumstances individually and as a whole, the trial judge's conclusion that the offending stanzas constituted a threat cannot be sustained particularly in the light of the factual error concerning the councillor's pre-existing relationship with the appellant, the political context in which the poem was written, its public dissemination, and the context of the stanzas in the poem and in the context of the earlier poem.

[43] Since, in my view, the Crown was unable to prove the first element of the offence, it is unnecessary to consider the appellant's arguments that the trial judge also erred regarding the second element of the appellant's intention.

3. Was the Verdict Unreasonable?

[44] Although the three offending stanzas, if viewed in isolation, *could* be interpreted as a threat, that is not the test. The test requires the stanzas to be viewed objectively, in context and by the reasonable person. The reasonable person would be informed about all the circumstances, including that the "poem" was written by an elderly retired man who was not proficient in the English language and who had the benefit of only three

years of education. He or she would also know that the appellant was frustrated by his perception that his councillor did not respond promptly or satisfactorily to his concerns, but that the author had never before given any indication that he would act on his concerns other than in the political context. The reasonable person would know that the appellant did not send this poem to the councillor, but posted it publicly for the stated purpose of public discourse in a way that the author could be easily identified. He or she would also know that the appellant denied that he intended to threaten the councillor with death, but stated that he intended only to argue that she should stop focusing on potholes and instead focus on doing her job. The informed reasonable person would also be cognizant of the right of ordinary citizens to criticize and ridicule their elected representatives. The test posited in *McCraw* asks whether, "[l]ooked at objectively, in the context of all the words written or spoken and having regard to the person to whom they were directed, … the questioned words convey a threat of serious bodily harm to a reasonable person". In my view, in the light of the entire context, no reasonable person, fully informed, could interpret the appellant's poem as a threat that could be taken seriously. No matter how misguided, offensive, and badly written the poem, the words at issue cannot meet the legal definition of a threat. The appellant is therefore entitled to a verdict of not guilty.

4. Expert Evidence

[45] Although, in view of this conclusion, it is unnecessary to deal with the appellant's challenge to the trial judge's decision to exclude the defence expert opinion, I will consider the issue briefly since it was a central argument of the appellant's case.

[46] The expert opinion of Professor Duffy, a qualified English scholar, was tendered at trial by the appellant on the basis that, without an academic understanding of satire, the trial judge could not understand a reasonable person's view of the meaning and intent of the poem. I would reject the appellant's argument that the trial judge erred in the exercise of his discretion to exclude the proposed expert opinion. As the appellant concedes, the trial judge correctly identified the test set out in *R. v. Mohan*, [1994] 2 S.C.R. 9. It was open to the trial judge to conclude that the expert opinion was not necessary to assist him in determining whether an ordinary reasonable person, informed of all the circumstances, would construe the poem as a threat to cause death or in deciding whether the appellant posted the poem with the intention that it be taken seriously.

[47] In addition, the trial judge's description of Dr. Duffy's opinion as not scientific was simply responsive to a submission of the appellant's counsel in the *voir dire* and did not demonstrate an error in his approach to the admissibility of expert evidence.

CONCLUSION

[48] The charge of intimidation included the same element of death threats. For the same reasons, it also cannot succeed. Accordingly, I would allow the appeal, set aside the conviction and substitute an acquittal of the appellant on both counts in the indictment.

"SEL"
RELEASED: November 28, 2008

"S.E. Lang J.A."
"I agree Robert J. Sharpe J.A."
"I agree G. Epstein J.A."