File No.: 37112

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

JOSEPH PETER PAUL GROIA

APPELLANT

and

LAW SOCIETY OF UPPER CANADA

RESPONDENT

and

DIRECTOR OF PUBLIC PROSECUTIONS, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ONTARIO, LAW SOCIETY TRIBUNAL, ADVOCATES' SOCIETY, BARREAU DU QUÉBEC, CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, FEDERATION OF LAW SOCIETIES OF CANADA, ONTARIO CROWN ATTORNEYS' ASSOCIATION, ONTARIO TRIAL LAWYERS ASSOCIATION, THE CANADIAN BAR ASSOCIATION AND THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

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FACTUM OF THE INTERVENER, THE ADVOCATES' SOCIETY

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I: OVERVIEW

1. The Advocates' Society intervenes in this appeal to assist the Court on two issues: (a) the admissibility and use in Law Society disciplinary proceedings of prior judicial decisions in which the lawyer was not a party; and (b) the appropriate standard to be applied under Ontario's *Rules of Professional Conduct* in disciplinary proceedings against advocates for uncivil courtroom conduct.

2. First, the Society submits that where the prosecution seeks to admit prior reasons as evidence on the matters at issue in a disciplinary proceeding, their admissibility is governed by this Court's decision in *British Columbia (AG) v. Malik*.[1] To be admissible, the lawyer that is subject to the prosecution must have been either a party or a "participant" in the prior proceeding. An advocate representing her client in the ordinary course is never a party or participant in the proceeding within the meaning of *Malik*, and reasons for decision from those proceedings are therefore not admissible as evidence against her in a subsequent Law Society prosecution.

3. Second, the Society submits that civility in the courtroom is both central to the administration of justice and consistent with the imperative of zealous advocacy. Nevertheless, advocates are not infallible and may occasionally falter. There must be an allowable margin of error so that the threat of prosecution for incivility does not interfere with the advocate's duties to her client. Disciplinary action for in-court conduct is appropriate only where that conduct brings, or has the potential to bring, the administration of justice into disrepute.

4. The Advocates' Society submits that this Court should adopt the following principles:

- An advocate representing her client in the ordinary course is not a participant in the proceeding for the purposes of the test set out in *Malik*.
- The reasons from a prior proceeding in which an advocate represented her client in the ordinary course are inadmissible as evidence on matters at issue in a subsequent disciplinary proceeding against that advocate.
- Disciplinary action for in-court conduct is appropriate only where that conduct brings, or has the potential to bring, the administration of justice into disrepute.

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[1] 2011 SCC 18 [*Malik*] **[Authorities, Tab 1]**

PART II: QUESTIONS IN ISSUE

5. The Advocates' Society's submissions are directed to two issues raised on this appeal:

a) Under what circumstances, and for what purposes, may a Law Society Hearing Panel admit the reasons of judges in prior proceedings in a disciplinary proceeding against an advocate who was not a party to those prior proceedings?

b) What is the test to be applied by a law society and its panels regarding whether or not the conduct of a lawyer in open court constitutes professional misconduct?

PART III: STATEMENT OF ARGUMENT

I. ADMISSIBILITY OF PRIOR REASONS BEFORE LSUC HEARING PANELS

6. Both the Hearing Panel and the Appeal Panel admitted the reasons for decision of the Superior Court and Court of Appeal in the *Felderhof* proceedings as evidence against Mr. Groia. They did so notwithstanding that Mr. Groia was not a party to those proceedings, had no opportunity to testify or call evidence, and had no right of appeal from the courts' decisions.

7. Admitting prior reasons against advocates in such circumstances contradicts the authority from this Court in *Malik* and the Law Society's *Rules of Practice and Procedure*.[2] It also undermines the proper administration of our justice system by ignoring the distinction between an advocate and her client, and by placing the advocate in a conflict of interest with her client.

1. Admissibility Under the Law Society's Rules of Practice and Procedure

8. Rules 24.07 and 24.08(2) of the Law Society's *Rules of Practice and Procedure* address reasons from prior proceedings. Rule 24.07 concerns the admissibility and weight of those reasons where the lawyer was a party to the prior proceeding. Rule 24.08(2) concerns admissibility of prior reasons more generally:

> 24.07 (1) Specific findings of fact contained in the reasons for decision of an adjudicative body in Canada are proof, in the absence of evidence to the contrary, of the facts so found if,
>
> …

[2] *Ibid.* **[Authorities, Tab 1]**

> (2) If the findings of fact mentioned in subrule (1) are with respect to an individual, subrule (1) only applies if the individual is or was a party to the proceeding giving rise to the decision.
>
> 24.08 …
>
> (2) At a hearing, the reasons for decision of an adjudicative body may be admitted as evidence. [Emphasis added.]

9. Rule 24.08(2) states that prior reasons "may" be admissible, but gives no guidance as to when they can be admitted, or the principles guiding their admittance. Neither the Hearing Panel nor the Appeal Panel in this case set out any factors to guide the admission of prior reasons.

10. This Court addressed this very question – the admissibility of prior reasons in subsequent judicial, administrative, or disciplinary proceedings – in *Malik*.[3] As the Court noted, admissibility depends on the purpose for which the reasons are sought to be admitted and the use sought to be made of them:

> Whether or not a prior civil or criminal decision is admissible in trials on the merits -- including administrative or disciplinary proceedings -- will depend on the purpose for which the prior decision is put forward and the use sought to be made of its findings and conclusions.[4] [Emphasis added.]

11. Prior reasons will always be admissible to prove that the prior proceeding took place and to prove its outcome. If, however, the prosecution seeks to admit prior reasons *as evidence on the matters at issue* in a disciplinary proceeding, then, as the Law Society accepted before the Court of Appeal,[5] their admissibility is governed by the criteria in *Malik*.

2. Admissibility of Prior Reasons Under *Malik*

12. In *Malik*, the issue was whether the findings of a judge in a prior application (to which only Mr. Malik was a party) were admissible as evidence in a subsequent proceeding against certain members of his family (in addition to Mr. Malik). Although Mr. Malik's family members were not parties to the prior proceeding, they did testify as witnesses in that proceeding, and their interests were aligned with those of Mr. Malik.

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[3] *Ibid.* **[Authorities, Tab 1]**

[4] *Ibid.* at para. 46 **[Authorities, Tab 1]**

[5] Court of Appeal Responding Factum of the Law Society of Upper Canada at para. 130 **[Authorities, Tab 8]**

13. Justice Binnie held that prior reasons are only admissible against the interests of a person in a subsequent proceeding if that person was a party or "participant in" the prior proceeding:

> …a judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the proceedings on similar or related issues. It will be for that judge to assess its weight.[6] [Emphasis added.]

14. This party/participant requirement is a threshold one; if it is not met, prior reasons are not admissible against the interests of an individual in a subsequent proceeding. But even if this requirement is satisfied, a prior judgment must still be relevant to be admissible.

15. As noted above, whether a prior judgment is relevant in a subsequent proceeding depends on the *purpose* for which a party seeks to admit it.[7] That a prior judgment may be admissible for one purpose (background and context) does not determine whether the court can use it for other purposes (evidence on matters at issue).[8] As the passage from *Malik* quoted at paragraph 13 confirms, only "findings and conclusions … on similar or related issues" are relevant and admissible as evidence in subsequent proceedings.

16. The words "findings and conclusions" may be vague, but it is clear that Justice Binnie was referring to findings and conclusions *of fact*.[9] The court made this point in *Ontario v. Rothmans*, where the Crown sought to introduce as evidence on a jurisdiction motion the decisions of courts in other provinces on essentially the same issue. In reviewing *Malik*, the court held the prior decisions were inadmissible as evidence as they did not contain findings *of fact*:

> In *Malik*, the "findings and conclusions" were factual ones … based on specific factual findings made about the Malik family finances.
> …

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[6] *Malik*, *supra* note 1, at para. 7 **[Authorities, Tab 1]**

[7] *Ibid.* at para. 46 **[Authorities, Tab 1]**

[8] *Ibid.* at para. 39 **[Authorities, Tab 1]**

[9] The findings included that the Malik family's financial affairs were interconnected and managed as one, that Mr. Malik and his family jointly owned businesses, and that Mr. Malik's alleged debts to family members were questionable because there was no legitimate documentation for them (see *Malik*, *supra* note 1, at paras. 15 and 18) **[Authorities, Tab 1]**

> The "findings and conclusions" that the Crown seeks to rely on from the Decisions are not factual, as in *Malik*, but consist of legal analysis and conclusions or questions of mixed fact and law.[10]

17. Only findings of fact, not comments or legal conclusions, are admissible *as evidence*.

18. *Malik* therefore creates three necessary pre-conditions, each of which must be satisfied before a prior decision can be admitted in a subsequent proceeding – including administrative or disciplinary proceedings[11] – *as evidence on matters at issue in that subsequent proceeding*:

a) The party to the subsequent proceeding must have also been a party to or participant in the prior proceeding;

b) Only findings and conclusions of fact in prior reasons are admissible; and

c) The issues in the two proceedings must be "similar or related".

19. The Law Society appears to argue (factum paras. 129-130) that the only requirement for admitting prior reasons in a subsequent proceeding is that the issues in the two proceedings are "related". This is wrong in law. All three of the *Malik* criteria must be satisfied, and only one of these concerns the relationship between the issues in the prior and subsequent proceedings. Similarly, whether the portions of Justice Rosenberg's reasons in the *Felderhof* proceeding concerning civility were obiter or were foundational to his decision (Law Society factum para. 130) is beside the point. Their admissibility is determined by the test set out in *Malik*.

3. Application of *Malik* to Disciplinary Proceedings Involving Advocates

20. An advocate representing her client in the ordinary course is not a "party or participant" in the proceeding, and the reasons from that proceeding therefore cannot be admitted against the advocate in subsequent disciplinary proceedings. This follows both from the use of the term "participant" in *Malik*,[12] and from the overriding policy considerations at issue.

(i) "Participant" Under the Malik Test

21. Justice Binnie's reasons in *Malik* leave no doubt that an advocate representing her client in the ordinary course is not a "participant" as that term is used in the decision. In *Malik*, the

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[10] *Ontario v. Rothmans*, 2011 ONSC 5356 at paras. 11 and 14 **[Authorities, Tab 6]**

[11] *Malik*, *supra* note 1, at para. 46 **[Authorities, Tab 1]**

[12] There is no dispute that an advocate representing her client in the ordinary course is not a party to the proceeding.

term "participant" referred to someone who had testified as a witness, had a direct stake in the outcome of the proceedings that aligned with that of a party (Mr. Malik), and whose personal activities and business relationships were squarely in issue. That is very different from an advocate representing her client in the ordinary course. Advocates have no opportunity to lead evidence, their interests are not aligned with those of their client, and their personal activities and relationships are not at issue in the proceeding.

22. There is no basis in law or policy to extend the definition of "participant" in *Malik* to encompass an advocate's role in a judicial or administrative proceeding. There may be distinct circumstances, such as when costs are awarded against a lawyer personally under rule 57.07 of Ontario's *Rules of Civil Procedure*, where a lawyer crosses the line from advocate to participant. But there the lawyer is afforded all the procedural safeguards one would expect – the right to counsel, to lead and challenge evidence, to make submissions, and to appeal. None of this is available to an advocate acting in the ordinary course.

23. Where an advocate has no opportunity to give evidence, is duty-bound to act in her client's interests, and has no right of appeal, it would be grossly unfair and highly prejudicial to admit the reasons from that proceeding into evidence against her on the basis that she was a "participant".[13] Reasons from such a proceeding are not admissible as evidence against the advocate in subsequent disciplinary proceedings because the first requirement set out in *Malik* is not satisfied. This conclusion is reinforced by the policy considerations at issue.

(ii) Overriding Policy Considerations

24. The defining role of an advocate is that she is not a participant in the proceeding in which she acts. An advocate's role is to represent and to advocate for her client, but the fight is the client's, not the advocate's. Difficult as it may be at times, it is an advocate's duty *not* to become one with the client, but instead to maintain professional independence and objectivity.

25. This fundamental distinction between advocate and client is all too often ignored. Members of the public frequently equate advocates with their clients and in so doing undermine one of the most important principles in our justice system. Every time members of the profession

[13] This issue is made clear by *Martin v. Martin*, 2015 ONCA 596 **[Authorities, Tab 5]**, in which the Court of Appeal noted with disapproval comments made by the judge during the course of the trial (see paras. 111-115). Were it not for an appeal by the client, the trial judge's comments might have been used as evidence in a later disciplinary proceeding.

or the judiciary blur the line between advocate and client, we further undermine the justice system we have all sworn to uphold.

26. The consequence of the Law Society's position on admissibility of prior reasons is that an advocate representing her client in the ordinary course would be considered a participant in such a proceeding. This would undermine the independence of advocates and, in so doing, undermine the administration of justice.

27. It would also strike at the heart of the solicitor-client relationship. The necessary result of the Law Society's position is that any time a judge makes a negative comment about the conduct of counsel in the course of a proceeding, the advocate is immediately placed in a conflict of interest and may have to withdraw. The advocate would have a personal interest in mitigating the potential effect of the judge's comments in subsequent disciplinary proceedings. This interest could influence the presentation of evidence or argument during the proceeding and it would therefore be untenable – and indeed unethical – for the advocate to continue to act.

28. An advocate cannot have an interest in the proceeding in which she acts. To treat advocates as participants will make them unable to fulfill their primary responsibility to their clients. It would deny clients their right to counsel of their choice and would render litigation unworkable in practice if advocates feel compelled to withdraw mid-trial.

29. The Advocates' Society considers it of the utmost importance that this Court clearly and unequivocally state that advocates are *not* participants in the proceedings in which they act, and that the reasons from such proceedings are *not* admissible as evidence on matters at issue in subsequent disciplinary proceedings.

4. Application to this Case

30. In this case, the reasons of the Superior Court and Court of Appeal in the *Felderhof* proceedings were not admissible on the matters at issue before the Hearing Panel, because the party/participant requirement set out in *Malik* was not satisfied. Both the Appeal Panel and Divisional Court found that Mr. Groia was not a party to the *Felderhof* proceedings.[14] The Divisional Court also found he was not a participant in those proceedings.[15]

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[14] *Law Society of Upper Canada v. Groia*, 2012 ONLSAP 12 at para. 196 [*Appeal Panel Decision*] **[Authorities, Tab 2]**; *Law Society of Upper Canada v. Groia*, 2015 ONSC 686 at paras. 127-128 (Div. Ct.) [*Divisional Court Decision*] **[Authorities, Tab 3]**

[15] *Divisional Court Decision*, *ibid.*, at para. 128 **[Authorities, Tab 3]**

31. Mr. Groia acted as Mr. Felderhof's counsel in the ordinary course. Moreover, as the Appeal Panel found, Mr. Groia did not have the opportunity to lead evidence, and his interests were not aligned with those of the actual party, his client.[16] The fact that Mr. Groia's own conduct was an issue in Justice Campbell's costs decision is insufficient to make him a "participant" in that proceeding. The conduct of counsel may be at issue when a court determines costs (even when not awarding them against counsel personally), but that does not transform the lawyer's role in the proceeding from advocate to participant.

32. The prior reasons from the *Felderhof* proceedings were therefore not admissible as evidence against Mr. Groia and both the Hearing Panel and Appeal Panel erred in concluding otherwise. The arguments at paragraphs 131-132 of the Law Society's factum regarding Mr. Groia's ability and alleged obligation to lead evidence to contradict the prior reasons, miss the point. They concern questions of weight and preclusive effect that arise only once the reasons are admitted, which they should not have been in this case.

5. Conclusion Regarding Admission of Prior Reasons

33. While prior reasons for decision will always be admissible in disciplinary proceedings to provide background and context, they are only admissible *as evidence concerning the matters at issue* if the lawyer being prosecuted was a party to or participant in the prior proceeding. In determining the admissibility and use of prior reasons, the following approach should be taken.

34. First, the Hearing Panel must determine whether the lawyer was a party to the prior proceeding. If so, then rule 24.07 applies. The reasons are admissible and are presumptive proof of the findings of fact they contain. It would then be for the lawyer to lead evidence to challenge that presumption.

35. Second, if the Hearing Panel concludes the lawyer was not a party to the prior proceeding, then 24.07 does not apply (it specifically only applies where the individual was a party to the prior proceeding). The inquiry then turns to whether the reasons are admissible under rule 24.08(2), which depends on whether the requirements in *Malik* are satisfied. If these requirements are not satisfied, the enquiry ends, and the reasons are not admissible as evidence on matters at issue in the disciplinary proceeding.

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[16] *Appeal Panel Decision*, *supra* note 14, at paras. 196-198 **[Authorities, Tab 2]**

36. Third, if the *Malik* requirements are satisfied and the lawyer was a participant in the prior proceeding, then the reasons are admissible on matters at issue. The Hearing Panel must determine what weight to assign to the prior reasons by applying the factors set out in *Malik*.[17]

II. THE TEST FOR PROFESSIONAL MISCONDUCT FOR INCIVILITY

37. An advocate's duties of zealous advocacy and civility in the courtroom are not incompatible. On the contrary, the highest level of effective advocacy exhibits forceful persuasion made in a courteous and dignified manner. The Advocates' Society upholds and promotes these ideals through its *Principles of Professionalism for Advocates*.[18]

38. As a matter of practice, however, tensions exist. Advocates will face tough circumstances where the zealous representation of a client involves pushing up against the boundaries of civility, testing the limits of courtesy and decorum, in a manner that may be uncomfortable.

39. Advocates are only human and their patience and judgment may occasionally falter, especially where strong mentorship is lacking. The same is true for judges, who may occasionally misapprehend or overreact to the conduct of counsel in their courtrooms. Neither advocates nor judges should feel unduly constrained by the threat of subsequent disciplinary proceedings against counsel.[19] The duties advocates owe to their clients must remain paramount.

40. A majority of the Court of Appeal agreed with the Appeal Panel that a precise definition of incivility is elusive and undesirable, and that what amounts to incivility will vary with the circumstances of the case.[20] But the majority of the Court of Appeal stopped there, offering no further insight into how the various contextual factors or circumstances relevant to the incivility analysis ought to be applied, and to what standard. A greater degree of guidance from this Court is required to distinguish acceptable and unacceptable in-court conduct.

41. The Advocates' Society submits that there must be an allowable margin of error and that disciplinary action is only appropriate for in-court conduct that brings, or has the potential to

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[17] *Supra* note 1 at para. 48 **[Authorities, Tab 1]**; see also: *Appeal Panel Decision*, *supra* note 14, at para. 174 **[Authorities, Tab 3]**

[18] First published in 2001 and revised and expanded in 2009, the Society's *Principles* have been widely cited by the courts, including in the proceedings below **[Authorities, Tab 7]**

[19] This language, which appeared in The Advocates' Society's factum before the Court of Appeal, **[Authorities, Tab 8]** was quoted with approval by that court in its decision: *Law Society of Upper Canada v. Groia*, 2016 ONCA 471 at para. 140 **[Authorities, Tab 4]**

[20] *Law Society of Upper Canada v. Groia*, 2016 ONCA 471 at paras. 124-125 **[Authorities, Tab 4]**

bring, the administration of justice into disrepute. This standard is similar to that adopted by the Divisional Court, which focused on the prospect of undermining the administration of justice, but it is oriented more toward the public's interest in the justice system.[21] Although conduct that brings the administration of justice into disrepute often will also threaten to undermine the administration of justice, such is not always the case. Focusing on the reputation of the administration of justice is appropriate, given the key role of the courts in Canada.[22]

42. The Society agrees with the Appeal Panel and the Court of Appeal that contextual factors ought to be considered as part of the analysis of whether a lawyer's in-court conduct has crossed the line into professional misconduct. But the appropriate *standard* to be applied to those contextual factors is that set out above, namely, whether the conduct brings, or has the potential to bring, the administration of justice into disrepute.

PART IV: SUBMISSIONS ON COSTS

43. The Advocates' Society seeks no costs and asks that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of July, 2017.


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[21] *Divisional Court Decision* at para. 76 **[Authorities, Tab 3]**

[22] In *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 this court recognized the importance of considering the reputation of the administration of justice when assessing the conduct of lawyers, all be it under somewhat different circumstances (see para. 29).

PART V: TABLE OF AUTHORITIES

Authorities Tab	Name	Referred to at paragraph(s)
	Cases	
1.	*British Columbia (AG) v. Malik*, 2011 SCC 18	2, 7, 10-13, 15, 16, 18-23, 30, 35, 36
2.	*Law Society of Upper Canada v. Groia*, 2012 ONLSAP 12	30, 31, 36
3.	*Law Society of Upper Canada v. Groia*, 2015 ONSC 686 (Div. Ct.)	30, 41
4.	*Law Society of Upper Canada v. Groia*, 2016 ONCA 471	39, 40
5.	*Martin v. Martin*, 2015 ONCA 596	23
6.	*Ontario v. Rothmans*, 2011 ONSC 5356	16
	Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin, 2017 SCC 26*	41
	Secondary Sources	
7.	*Principles of Professionalism for Advocates* (The Advocates' Society: 2009)	37
8.	Responding Factum of the Law Society of Upper Canada before the Court of Appeal	11

* *case available on line*

PART VI: LEGISLATION RELIED UPON

Law Society of Upper Canada, Law Society Tribunal, Hearing Division, *Rules of Practice and Procedure*, Rules 24.07 and 24.08

Proof of prior facts

24.07 (1) Specific findings of fact contained in the reasons for decision of an adjudicative body in Canada are proof, in the absence of evidence to the contrary, of the facts so found if,

(a) no appeal of the decision was taken and the time for an appeal has expired; or

(b) an appeal of the decision was taken but was dismissed or abandoned and no further appeal was taken.

(2) If the findings of fact mentioned in subrule (1) are with respect to an individual, subrule (1) only applies if the individual is or was a party to the proceeding giving rise to the decision.

Transcript of proceeding

24.08 (1) At a hearing, a transcript of a hearing before an adjudicative body may be admitted as evidence.

Reasons

(2) At a hearing, the reasons for decision of an adjudicative body may be admitted as evidence.

Preuve de faits antérieurs

24.07 (1) Les constatations de fait précises qui figurent dans les motifs de la décision d'un organisme juridictionnel du Canada constituent la preuve, en l'absence de preuve contraire, des faits en cause si, selon le cas:

(a) il n'a pas été interjeté appel de la décision et le d'appel est expiré;

(b) il a été interjeté appel de la décision, mais l'appel a été rejeté ou a fait l'objet d'un désistement et aucun autre appel n'est prévu.

(2) Si les constations de fait visées au paragraphe (1) concernent un particulier, ce paragraphe ne s'applique que si celui-ci est ou était partie à l'instance qui a donné lieu à la décision.

Transcription de l’instance

24.08 (1) Une transcription de l’audience devant un organisme juridictionnel peut être admise en preuve à l’audience.

Motifs

(2) Les motifs de la décision d’un organisme juridictionnel peuvent être admis en preuve à l’audience.