Unofficial English Translation of the Judgment of the Court

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| Chatillon c. R. | 2022 QCCA 1072 |
| COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBEC |
| REGISTRY OF | MONTRÉAL |
| No.: | 500-10-007350-208 |
| (455-01-016160-180) |
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| DATE: | August 1, 2022 |
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| CORAM: | THE HONOURABLE | MARTIN VAUCLAIR, J.A.ROBERT M. MAINVILLE, J.A.PATRICK HEALY, J.A. |
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| OLIVIER CHATILLON |
| APPELLANT – Accused  |
| v. |
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| HER MAJESTY THE QUEEN |
| RESPONDENT – Prosecutor |
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| JUDGMENT |
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| **ORDER OF NON-PUBLICATION****The order of non-publication issued at first instance remains in force.** |

1. Olivier Chatillon (“the appellant”) seeks to appeal from a judgment rendered on June 1, 2020, by the Honourable Serge Champoux of the Court of Québec, District of Bedford. The judgment convicts him on one count of sexual assault against a child.
2. For the reasons of Vauclair, J.A., with which Healy,J.A. concurs, **THE COURT**:
3. **ALLOWS** the application for leave to appeal;
4. **ALLOWS** the appeal; and
5. **ACQUITS** the appellant.
6. Mainville, J.A. would have dismissed the appeal on the basis that the appellant’s admissions were admissible.

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|  | MARTIN VAUCLAIR, J.A. |
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|  | ROBERT M. MAINVILLE, J.A. |
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|  | PATRICK HEALY, J.A. |
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| Mtre Nicolas Lemyre-Cossette |
| POITRAS FOURNIER COSSETTE AVOCATS |
| For the appellant |
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| Mtre Maxime Hébrard |
| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS |
| For the respondent |
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| Date of hearing: |  June 7, 2021 |

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| REASONS OF VAUCLAIR, J.A. |
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1. Olivier Chatillon (“the appellant”) wanted help. He knew he was suffering from a substance abuse problem and a sexual deviance problem. He undertook a completely voluntary effort to receive care and, at the urging of the professionals from whom he was receiving treatment, admitted to his problems, which were crimes under the circumstances.
2. The question in this appeal is whether admissions the appellant made to the medical team regarding his criminal conduct were protected by privilege in the criminal law context and, accordingly, whether those admissions were admissible in evidence against him. In addition to his notice of appeal, an application for leave to appeal was referred to this panel.
3. The trial judge found that the prosecution’s case could validly be based on the admissions the appellant made to the professionals who were assessing him. The parties agree, as they did in the court below, that the appeal and the verdict hinge on this point.
4. For the following reasons, I would quash the trial judge’s decision, declare the appellant’s admissions inadmissible in evidence, and acquit him.

Background

1. The appellant had an addiction problem involving certain intoxicating substances. In August 2016, he had a short-term relationship with a woman. At two distinct times while alone with her 4‑year‑old child, he committed sexual acts upon that child.
2. It is admitted that, during the first incident, he rubbed his penis on the child’s genitals while the child was sitting on his lap. Both he and the child were clothed, and the conduct lasted only a few seconds. In the second incident, he covered the child’s eyes and placed his penis on the child’s tongue, also for a few seconds.
3. Those are the appellant’s crimes (“the crimes”).
4. In late August, his relationship with the woman ended for other reasons, and from that point forward, he no longer had any contact with her household.
5. Soon thereafter, he voluntarily undertook treatment for his substance addiction. This was not his first time in treatment. The treatment took several months and included detoxification and gradual rehabilitation. In the course of his treatment, he discussed a possible sexual deviance problem with a physician, who referred him to the professionals at the Institut Philippe-Pinel (“the Pinel institute”).
6. The first professionals he met there—this was in May 2017—were criminologist Geneviève Ruest and psychiatrist Benoit Dassylva. Neither of them testified.
7. As part of the intake assessment at the Pinel institute, he spoke about everything, including the two incidents described above (“the crimes”), which had occurred nine months earlier. He felt he was imparting information to health care professionals that was to be kept confidential and was protected by professional secrecy; this was confirmed, in his view, by his past experiences with other workers. He did not believe it necessary to specify that his statements were confidential. He is categorical that Ms. Ruest, the criminologist, never told him that the information imparted to her could be provided to the police.
8. A few days later, the appellant met with Dr. Dassylva, who he says was in possession of the criminologist’s report. They spoke about the crimes. Dr. Dassylva did not specifically tell the appellant he had a duty to make a report to the Direction de la protection de la jeunesse (“Youth Protection”). From Dr. Dassylva’s comments, the appellant took it that Dr. Dassylva was emphasizing the opportunity to help the victim, that this was a therapeutic process, and that he needed to be honest and transparent. The appellant hoped to be admitted so he could get the help he wanted. He felt he needed to put his cards on the table, and agreed to contact Youth Protection, in much the same way as he took part in testing, such as a penile plethysmography, to secure his admission to treatment. When questioned, he said he could not recall whether the police were mentioned at this meeting.
9. The appellant’s understanding from Dr. Dassylva’s statements was that admitting to his crimes was important for his treatment. He concedes he was never told outright that this was a condition for entering the treatment; his understanding stemmed from the requirements of honesty and transparency, necessary for the therapy, that the clinicians expected him to meet. Still, the appellant wanted to be honest and transparent, as was required from him.
10. With respect to this point, the trial judge seems to have agreed with the appellant’s point of view when he testified that honesty and transparency help therapy work. He asked:

[translation]

Q. So it’s normal and unsurprising that they were telling you to be honest and transparent? Am I mistaken? In order for treatment to be meaningful in any way?

1. The appellant explained that, once his crimes were admitted to, he was told he would have to get in touch with Youth Protection on his own to help the victim, so that it could be ascertained whether she was suffering from psychological after-effects and whether she should be offered services.
2. The appellant was directed to a doctoral candidate in psychology named Jo‑Annie Spearson-Goulet (“Ms. Spearson-Goulet”), who took charge of him for a [translation] “group pre-admission” assessment for the group therapy she was leading with another therapist. The meeting was held on May 23, 2017.
3. Ms. Spearson-Goulet has few specific recollections of the discussions with the appellant at this meeting as they relate to the crimes or to the anticipated disclosure to the DYP. Since she was not involved at the appellant’s intake, all she could state was that the [translation] “usual” practice was to inform [translation] “patients of the limits to confidentiality”. Aware of the admissions made at the intake meeting with Dr. Dassylva, she explained that she wanted to work with the appellant to determine how to disclose the matter to Youth Protection.
4. Ms. Spearson-Goulet explained to the judge that she gave the appellant three [translation] “choices”: she could report the crime to the Director of Youth Protection (“DYP”), he could do so on his own, or they could do so [translation] “together”. She does not recall much from her discussions with the appellant at the time. She believed she had a legal obligation to report the matter to the DYP.
5. The appellant was amenable to notifying the DYP, but says that at the time the phone call was made, he was unaware his statements would end up in the police’s hands because that question had never been brought up, even in the conversation with Youth Protection. After the phone call, he learned the DYP would be notifying the police, but he says he thought this was for the purpose of providing help to the victim.
6. Youth Protection caseworker Gabriella Landry (“Ms. Landry”) testified that she did indeed receive the report and that, in her view, there were no grounds to believe the child was now in danger. She added that, whenever she receives a report of sexual abuse, she must make a report to the police.
7. The appellant repeated that the police were never brought up during the call, that he was never cautioned, and that he would absolutely have not said a thing had he known the disclosed information could be used to incriminate him.
8. The police received the report from the DYP on June 21, 2017. Nothing much happened until March 2018, when the detective took the first step of communicating with Ms. Spearson-Goulet directly to obtain her notes from her interview with the appellant. She obtained the appellant’s authorization to give the police the notes containing his admissions. The authorization document, signed on March 20, 2018, is a rather generic institutional form authorizing the institution to send the Sûreté du Québec the [translation] “May 23, 2017, psychological progress notes”.
9. Ms. Spearson-Goulet recalls little of her discussion with the appellant in which she followed up on the detective’s request. She says she received the appellant’s consent after explaining the request by the “detectives” that [translation] “we could send the note confirming the information which together we had given to Youth Protection.” She testified:

[translation]

We—well, we notified Mr. Chatillon that the detectives had contacted us about their request. We explained to him that we had complied with professional secrecy and had not disclosed that this matter involved a patient, but that we had asked for authorization in the event that it was a patient… this involved some hypotheticals, but it’s how we managed to avoid difficulties. We explained to him that we could send the note confirming the information we had together given to Youth Protection. We asked him if he would be OK with signing an authorization for this purpose, and he signed one. After that, from what I remember, we showed him the note that would be sent along so he would know, but… that’s it. I must admit that this is far back.

1. On the other hand, according to the appellant’s recollection, Ms. Spearson-Goulet asked him to sign to confirm he was the one who had made the declaration to the DYP. He was not cautioned at that time. He would not have agreed to sign if he had known the police would charge him. He was unaware of any of the authorities’ activities, and he continued to believe the victim needed assistance. Once again, he admits that he did not ask questions, because he trusted his therapists.
2. Ms. Spearson-Goulet cannot say whether the appellant understood the consequences of sharing the progress notes with the police; rather, she responded with a generality, saying he knew the information would be passed on to the police officers.
3. Following his arrest, the appellant made no statements.

The motion and trial judgment

1. At trial, the appellant challenged the admissibility of his admissions. He filed a motion to exclude evidence, citing infringements of sections 7 and 9 of the *Charter*. The body of his motion contains arguments that rely on the Wigmore privilege test with a view to protecting his relationship with the professionals of the Pinel institute.
2. The trial judge rejected all his arguments: *R. c. Chatillon*, 2020 QCCQ 2044. His analysis of several of the issues involved is rather cursory.
3. The trial judge devoted more attention to the analysis of the Wigmore privilege test as it relates to respect for professional secrecy. In this analysis, he found that the professionals had a duty to report the appellant’s conduct to the DYP, despite the professional secrecy characteristic of therapeutic relationships.
4. The judge analyzed the Wigmore criteria, which are the following: (1) the communications must originate in a confidence that they will not be disclosed, (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties, (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
5. The trial judge found that the circumstances do not meet the first and second parts of the test, primarily because the appellant agreed to participate in group discussions and took part in the reporting to the DYP: *Chatillon*, *supra* at paras. 55–59. He acknowledged that the third part of the test was met: *Chatillon*, *supra* at para. 60. He then concluded that the fourth part was not met. He stated that the evidence does not support the contention that it is preferable to enable an abuser to seek help than to search for the truth in a criminal trial. He also noted that nobody forced the appellant to disclose the crimes. He considered the argument akin to [translation] ““blackmail” setting the possibility of therapy with no charges against the prosecution of people who commit assault,” and opined that the dangerousness of the abuser needs to be neutralized: *Chatillon*, *supra* at paras. 64–69.
6. Based on this, the trial judge rejected the contention that the appellant’s admissions were privileged.
7. In the course of his analysis, the trial judge accepted as a question of fact that [translation] “Olivier Chatillon confessed to a crime before knowing there was an obligation to report it”: *Chatillon*, *supra* at para. 65. [Emphasis in the original.]
8. He stressed that, in his view, the DYP did not unlawfully refer the matter to the police, since the DYP itself had closed the case internally. He wrote that, although the child was not in danger, the appellant could pose a danger to other children: *Chatillon*, *supra* at paras. 75 and 77.
9. The judge was no more sympathetic to the argument that the law compelled the appellant to incriminate himself. Since that argument has not been raised on appeal, it need not be further addressed.
10. The trial judge also rejected the idea that the professionals were people in authority, because the appellant himself believed the opposite and thought the professionals would not report on him. He was satisfied that the appellant’s consent to the police being sent his psychologist’s notes in March 2018 was valid. In his opinion, the psychologist’s testimony [translation] “is very clear with regard to the circumstances of his signature and consent”: *Chatillon*, *supra* at para. 100.

THE APPEAL

1. This appeal raises three questions:

1. Did the trial judge err in fact and in law in his application of the Wigmore criteria to determine whether the accused’s statements were privileged?

2. Did the trial judge err in law in refusing to make a determination about the claimed violation of the right to silence?

3. Did the trial judge err in fact in finding that the appellant freely and voluntarily consented to his statement being provided to the police?

ANALYSIS

1. Exhibit R-1 contains the appellant’s admissions; in conjunction with Ms. Spearson‑Goulet’s testimony, it constitutes the only evidence of his guilt.
2. When Ms. Spearson-Goulet sought to testify about the admissions, counsel for the appellant chimed in to point out that the crimes are described in the note (Exhibit R‑1) and are not contested.
3. In addition, Ms. Spearson-Goulet testified that when she contacted Youth Protection, she provided the information contained in Exhibit R‑1 as regards the crimes. Since the appellant made those admissions to professionals he had already consulted, she said she felt this information remained hearsay until the appellant approved or confirmed his statements to her. Also, she said the appellant actively participated in the reporting to Youth Protection, initially with his general permission and later by providing a few details directly to Ms. Landry, the Youth Protection caseworker.
4. The appellant’s guilt, then, is based on the confirmation of the admissions made to his psychologist Ms. Spearson-Goulet on May 23, 2017, and recorded in the note filed as Exhibit R‑1.
5. Unlike the trial judge, I am not satisfied that the child was in a situation of endangerment. Consequently, the professionals who were consulted were not under a legal obligation to disclose the crimes to the DYP. In fact, Ms. Landry testified that there was no endangerment (appellant’s factum at 183) and Spearson‑Goulet testified that [translation] “once there is no contact with… and the family is not involved and there is no contact with the child, the DYP no longer needs to be on the case.” (Appellant’s factum at 100). Nor am I satisfied that the law required the DYP to report to the police. In fact, Ms. Landry testified that she is unable to provide a basis for any obligation to do so (appellant’s factum at 182-183).
6. However, the admissibility of the admissions and therefore the outcome of this appeal do not depend on the findings regarding the subsequent actions of the professionals, so I will consider the privilege claimed by the appellant, which he argues prevents the admissions from being admitted in evidence.
7. It is not disputed that the approach propounded by Professor Wigmore is in issue in this case: J.H. Wigmore, *Evidence in Trials at Common Law*, vol. 9 (Toronto: Little, Brown, 1961)at para. 2285. As I note in paragraph [30] of these reasons, the trial judge went over the [translation] “Wigmore criteria or test”: *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *R. v. Gruenke*, [1991] 3 S.C.R. 263 at 282.
8. Dealings between a patient and his or her physician, psychiatrist, psychologist, or therapist may be subject to a case-by-case privilege: *R*. *v.* *McClure*, [2001] 1 S.C.R. 445at para. 29.
9. The burden is on the party relying on the privilege to show that all the factors or criteria necessary to its application are met: *R. v. National Post*, [2010] 1 S.C.R. 477at para. 64; *R. v. Gruenke*, [1991] 3 S.C.R. 263 at 293.
10. In my opinion, the trial judge erred in his analysis of the first two criteria of the test, which he found are not satisfied. Firstly, he concluded that the appellant disclosed his crimes before knowing the therapists might send the information to a third party, namely the DYP. Then, he found that the appellant’s involvement in group therapy negates any expectation of confidentiality. However, the possibility that evidence was disclosed to a third party does not necessarily rule out a breach of confidence: *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157at para. 24; *R. v. S.(R.)* (1985), 19 C.C.C. (3d) 115 at 131 (Ont. C.A.).
11. I find that the first three criteria of the test are met. The fourth must now be considered. This criterion is case-specific, so the outcome of its application does not establish an immutable or even general rule. Different facts can lead to different conclusions.
12. As the Supreme Court reminds us, “The fourth requirement is that the interests served by protecting the communications from disclosure outweigh the interest of pursuing the truth and disposing correctly of the litigation”: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157at para. 29.
13. The Supreme Court points out that “the common law must develop in a way that reflects emerging *Charter* values. It follows that the factors balanced under the fourth part of the test for privilege should be updated to reflect relevant *Charter* values”: *M.(A.) v. Ryan*, *supra* at para. 30. [Emphasis added.]
14. With respect, the trial judge failed to take this factor into account.
15. Specifically, it is undeniable that in this exercise, the fundamental *Charter* value that protects against self-incrimination needs to be considered: sections  7, 10, 11, and 13 of the *Charter*. Using confidential communications between a therapist and his patient as the *sole* evidence of guilt certainly offends *Charter* values.
16. In *M.(A.) v. Ryan*, *supra*, the Court refers to the important value of privacy, reflected, *inter alia*, in section 8 of the *Charter*, in a civil case where the medical records of a sexual assault victim were being sought. The Court imported this *Charter* value, which is not the same thing as enforcing the *Charter* in a civil case.
17. In the case at bar, the Court should not apply the constitutional guarantees against self-incrimination in a context where admissions were made to non‑government actors. Nonetheless, the importance that the supreme law accords to protection against self-incrimination needs to be considered in assessing whether doctor-patient or more generally therapist-patient relationships are covered by a privilege.
18. The respondent relies on *R. v. S.(R.)* (1985), 19 C.C.C. (3d) 115 (Ont. C.A.). There, following two waves of sexual abuse complaints against the appellant for acts alleged to have been committed on his spouse’s children, group counselling was recommended by the physicians consulted by their mother. The appellant attended the second counselling sessions voluntarily. He knew the sessions were being recorded. He was confronted by the revelations and by the clinician who was leading the counselling. He remained silent when faced with the accusations. The prosecution sought to use his silence as evidence at trial—a silence which, according to the trial court, spoke volumes. The Ontario Court of Appeal did not hesitate to find that the group therapy did not defeat the appellant’s expectation of privacy: *R. v. S.(R.),* *supra* at 131. In light of a lack of unanimity in scholarly writing regarding the importance of confidentiality in the physician-patient relationship, which goes to the second factor of the Wigmore test, the Court preferred not to state an opinion: *R. v. S.(R.),* *supra* at 132. The third factor of the Wigmore analysis, the importance of preserving family therapy, was conceded, but the Court also noted that divorce legislation encourages such sessions, reflecting their importance as a societal objective.
19. The fourth part of the Wigmore approach was not met, however. In general terms, the Ontario Court of Appeal found that, in a criminal trial for sexual abuse against children, the search for truth is more important than the need for family therapy. The Court noted that several jurisdictions, including Ontario, had enacted laws compelling the disclosure of child abuse and neglect, which demonstrates that the public interest outweighs the confidentiality of statements made to psychiatrists. Lacourcière, J.A., speaking for the Court, wrote:

It is sufficient to say that the information obtained in the course of psychiatric counselling or treatment where child abuse is involved does not meet the test adopted in *Slavutych v. Baker et al.* (1975), 55 D.L.R. (3d) 224, [1976], 1 S.C.R. 254, 38 C.R.N.S. 306. Society considers the detection and prevention of child abuse more important than the confidentiality of psychiatric counselling. I would therefore conclude that the learned trial judge did not err in ruling that the evidence of Dr. Sawa and the tapes and transcript of the counselling session were admissible. I would not give effect to this ground of appeal.

*R. v. S.(R.)* (1985), 19 C.C.C. (3d) 115 at 136 (Ont. C.A.).

1. I should note that the Ontario Court of Appeal did not engage in a weighing of *Charter* values in this 1985 decision, since it was obviously speaking prior to *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157.
2. The respondent has marshalled some other case law to dispose of the fourth branch of the Wigmore analysis, certainly the hardest one to establish. The first authority it cites in this regard is *Verret*, a decision of our Court where the controversy involved the confidentiality of revelations, made in during treatment for alcohol addiction, about a murder committed decades earlier: *R. c. Verret*, 2013 QCCA 1128 at paras. 21–33. In this regard, I should point out that the nature of that crime was different, that the appellant in that case had also made admissions to her roommate, and that DNA evidence was also available. That said, the appellant in *Verret* admitted to her caseworker that she had been an accomplice to murders, and drafted a letter intended for her sister, who was one of the two victims. The Court explained that the statements in the letter were reliable and, in combination with the caseworker’s testimony, decisive for the prosecution’s case. It then noted that the first three criteria of the Wigmore test, but not the fourth, were met. And although this was not decisive, it took into account the fact the appellant had agreed to her caseworker sharing her confidence with her superior. Lastly, the Court approved of the trial judge’s analysis comparing the letter with a [translation] “writing that can be considered private and that the accused wrote in an intimate moment”: *R. c. Verret*, *supra* at para. 33.
3. I agree with the result to which the Court came in *Verret*. For one thing, the connection between the therapeutic process undertaken as part of an alcoholism treatment plan and the admission to a murder is tenuous at best. It is much fairer to say that the revelation is quite peripheral. Furthermore, even if the evidence is significant, as any form of admission would clearly be, it remained circumstantial, and other kinds of evidence remained available.
4. The respondent also relies on *R.* *v.* *Karasek*, 2011 ABCA 161. In *Karasek*, the psychiatrist told the police about two recent instances where an individual had re‑offended. He was already treating the individual for sexual deviance because of a sexual assault against a child a few years earlier.
5. It is significant that Karasek had pled guilty, that he posed a danger to other victims, and that the psychiatrist was testifying in connection with sentencing, specifically regarding a dangerous offender designation. Clearly the context of *Karasek* is markedly different in that the appellant there pled guilty and the report to the police was due to his dangerousness—a recognized exception: *Smith v. Jones*, [1999] 1 S.C.R. 455.
6. The other case the respondent cites is *R. c. G.D*., 1998 CanLII 13015 (Que. C.A.), where our Court refused to recognize a privilege covering an admission after a sexual assault to the murders of two children in 1979. At the time the admission was made, the appellant was serving a sentence in a penitentiary and had voluntarily undertaken sexual deviance therapy through the authorities—specifically, parole system professionals. The Court noted that the appellant was speaking with an agent of the government who was to report the admissions to the authorities with a view to assessing the terms and conditions of his parole; that he met directly with investigating police officers; and that he made a full and admissible written statement. It released the professionals who were treating the appellant from their obligation of professional secrecy.
7. Once again, the facts of *R. c. G.D.* are very different from those in this appeal. While there were dealings with a professional who promised confidentiality in that case, I doubt it was part of a genuine therapeutic process or that this process was central to the relationship. From the facts of that case, it seems more like the appellant was hoping to be paroled soon. Lastly, like the Ontario Court of Appeal in *R. c. S.(R.)*, *supra*, our Court did not examine the impact of *Charter* values on the privilege.
8. I am not unaware of the importance of effective criminal trials, and I realize there will be cases where the admissions made by a person will be used against them, even if given as part of a therapeutic relationship. The authorities cited by the respondent are examples of these types of cases. But in the case at bar, the situation leads me to conclude that the appellant’s statements were privileged and inadmissible in evidence.
9. I find it would be unjust and contrary to *Charter* values to use statements against the appellant that were made to discuss a matter of sexual deviance as part of a treatment process voluntarily undertaken with an organization that treats sexual deviance. While sexual deviance is not always a crime, the fact remains that the very nature of the admissions in this case lie at the heart of the problem and of the help that was being sought for the problem. This is an important contextual element in the case at bar.
10. Furthermore, the fundamentally personal therapeutic process in the case at bar, which was animated by no other objective but to solve a grave problem, was undertaken in good faith and in a completely forthright manner.
11. Lastly, I note that the evidence reveals, and that the trial judge agreed, that before he made his admissions, the appellant was never cautioned they might be used to incriminate him. It is stunning that the organization in question did not have a clearer protocol for prospective patients that its representatives could easily explain, knowing that while not all sexual deviants have committed crimes, there will be others, like the appellant, who have.
12. Lastly, there was no danger requiring the neutralization of the appellant or immediate action. As the Ontario Court of Appeal noted in *R. v. S.(R.)*, society’s interest in helping young victims who are in danger points to the importance of that objective. However, one must take into account that legislation allows professionals to be released from secrecy and from the confidentiality of their dealings with their patients only in specific circumstances. Endangerment of a child is the exception in the *Youth Protection Act*, CQLR, c. P‑34.1 (sections 38 and 39.1). It was not found to exist in the case at bar. Legislation also provides techniques to address the imminent danger posed by certain people who consult professionals bound by secrecy, by enabling those professionals to address such danger: see, *inter alia*, section 60.4 of the *Professional Code*, CQLR, c. C‑26; section 18 of the *Code of ethics of psychologists*, CQLR, c. C‑26, r. 212, and section 20 of the *Code of ethics of physicians*, CQLR, c. M‑9, r. 17.
13. These provisions lend credence to the idea that our society considers the secrecy of professional-patient relationships important. And they are consistent with *Charter* values*.*
14. Failing to protect an admission made under circumstances such as these strikes me as contrary to common sense, and as a disincentive for people who are struggling with sexual deviance and who want to seek the help their condition requires. Although evidence cannot show with certainty that a candidate would not undertake therapy if it could lead to their being brought before a criminal court, this would seem self-evident. Unlike the trial judge, I believe it is a probable inference, justified by the evidence, and grounded in common sense.
15. Since the prosecution concedes that the inadmissibility of the appellant’s admissions would require his acquittal, I would allow the application for leave to appeal, allow the appeal, and acquit the appellant.

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| MARTIN VAUCLAIR, J.A. |

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| REASONS OF MAINVILLE, J.A. |
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1. I have read the reasons of my colleague Vauclair, J.A. but cannot concur. My reasons for this are as follows.
2. Four elements are decisive in the present case:
3. As part of a therapeutic relationship initially undertaken to treat a substance addiction problem, the appellant admitted he sexually assaulted a 4‑year-old child, notably by placing his penis on the child’s tongue.
4. It is not contested that his admissions are truthful.
5. The appellant agreed to his admissions being provided to Youth Protection and, in writing, authorized the transmission of notes containing those admissions to the Sûreté du Québec (“SQ”).
6. The appellant’s conviction hinges on the admissibility of his admissions as part of a criminal trial.
7. As my colleague notes, this appeal essentially concerns the admissibility of the appellant’s admissions in light of the Wigmore analysis, which involves four criteria: (1) the communications must originate in a confidence that they will not be disclosed, (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties, (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
8. My colleague has concluded that the trial judge erred in the application of these criteria. Firstly, he finds that the judge erred in concluding that the first two criteria of the Wigmore test have not been met. With respect to the fourth criterion, my colleague is of the opinion that it would be unjust and contrary to the values of the *Canadian Charter of Rights and Freedoms* to use admissions against the appellant that were made as part of a voluntary therapeutic process.
9. Like my colleague, I accept that one can have doubts about the admissibility in a criminal trial of admissions made confidentially as part of a therapeutic process undertaken in good faith, despite the reporting obligation contained in Quebec’s *Youth Protection Act*. However, it is not necessary to address or decide this question in this appeal.
10. This is because the appellant, in consenting to the disclosure of his admissions, including to the SQ, expressly waived their confidentiality. As a result, the Wigmore criteria, which if met would bar the admissions from being admissible in evidence in a criminal trial, have not been met.
11. It should be noted that the trial judge rejected the appellant’s assertions that his consent to the disclosure of his admissions was vitiated. The trial judge found at paragraph 101 of the judgment that these assertions were [translation] “far-fetched” and therefore could not be believed. That finding of fact is based on the assessment of the credibility of the various witnesses heard at trial, and benefits from great deference on appeal.
12. Furthermore, this assessment of the credibility of the testimony is very reasonable, given that the appellant consented in writing to the disclosure to the SQ, that he knew the SQ is a police force that investigates crimes, and that the sexual assaults to which he admitted are crimes. And it defies common sense to believe the disclosure of a sexual assault to the SQ could not lead to a police investigation and potential criminal charges.
13. In any event, even if the judge erred as to the foregoing, the appellant’s mere subjective belief that his consent to the disclosure to the SQ could not be the basis for criminal charges would be insufficient to prevent the admissions from being admissible in a criminal trial. Apart from the fact that the consent to the disclosure, whatever the appellant’s subjective belief regarding the police’s use thereof may have been, is sufficient to find that the first two criteria of the Wigmore analysis have not been met, the fourth criterion is not met under these circumstances either. Indeed, I find it difficult to imagine how a mistaken subjective belief of such nature could constitute the kind of situation contemplated by the Wigmore analysis, such that a just decision based on the truth could be rejected.
14. For these reasons, I would dismiss the appeal.

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| ROBERT M. MAINVILLE, J.A. |